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**BEFORE THE ARIZONA CORPORATION COMMISSION**

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| IN THE MATTER OF DISSEMINATION OF INDIVIDUAL CUSTOMER PROPRIETARY NETWORK INFORMATION BY TELECOMMUNICATIONS CARRIERS. | DOCKET NO. RT-00000J-02-0066<br>**QWEST CORPORATION'S NOTICE OF FILING REPLY COMMENTS RE: CPNI** |

NOTICE IS GIVEN that Qwest Corporation files herewith their Reply Comments regarding Customer Proprietary Network Information .

DATED this 29th day of April, 2002.

Arizona Corporation Commission
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## I. General Remarks

Pursuant to procedural order dated February 15, 2002 in this proceeding, Qwest respectfully submits these reply comments in response to submissions of other parties. Qwest reiterates that it takes the matter of customer privacy seriously. It has a long tradition of treating the content of customer conversations confidentially, as well as the transactional information associated with telecommunications services. In its opening comments, Qwest argued that customer interests in protecting the privacy of Customer Proprietary Network Information ("CPNI") were adequately addressed through a businesses' use of an opt-out CPNI approval process. It stressed that government efforts to impose an opt-in approval regime were most certain to fail under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Even if the review were to be undertaken by the Ninth Circuit rather than the Tenth, the Arizona Corporation Commission ("ACC") would be unable to prove that an opt-in CPNI approval mandate directly and materially advanced compelling government interests in a narrowly-tailored manner.[1]

Other commenting parties share Qwest's concerns regarding the lawfulness of a government-mandated opt-in CPNI approval regime. Those commentors confirm that constitutionally-protected speech interests are at stake in this proceeding and that government regulation of CPNI use must be crafted in a manner that accords with constitutional jurisprudence. They argue that only an opt-out CPNI approval mandate

[1] *United Reporting Publishing Corp. v. Los Angeles Police Dept.*, 146 F.3d 1133 (9th Cir. 1998) ("*United Reporting*"), *rev'd sub nom Los Angeles Police Dept. v. United Reporting Company*, 528 U.S. 32 (1999), (holding that a statute seeking to limit the release of arrestee records failed to directly and materially advance the government's interests in protecting the arrestee's privacy). *And see* Qwest at 7.

will withstand constitutional scrutiny.[2] Moreover, like Qwest, these carriers argue that an opt-out approach reflects sound public policy and provides appropriate customer choice regarding CPNI use.

Consistent with constitutional protections afforded Qwest's customers and its business operations, as well as prior FCC statements regarding the preemptive effect of federal law in this area, Qwest urges the ACC to refrain from enacting any state-specific CPNI rules at this time. The ACC will be free to revisit the matter when the FCC issues its Order, ruling on those matters addressed by the Tenth Circuit Court of Appeals.

Below, Qwest responds to certain filed remarks with which it takes issue in order to provide the ACC with a complete record on these matters of importance.

## II. Response to AT&T Arguments

Qwest has two comments directed to AT&T's filing. First, Qwest addresses AT&T's assertion that it has secured **affirmative** CPNI approvals and questions whether such characterization is appropriate with respect to all the referenced approvals. Second, Qwest opposes AT&T's argument that a BOC Section 272 affiliate should be treated as an unaffiliated third party with respect to CPNI approval processes and CPNI use.

### A. Affirmative Approval Assertions

AT&T makes clear its belief "that an opt-out notice is equally effective [as an opt-in one] in protecting customer privacy interests" and that "an opt-in policy is not sufficiently and narrowly tailored to overcome First Amendment concerns."[3] While that

[2] *See* AT&T at 3-4; Sprint at 1-5. *Compare* WorldCom at 3-4 (limiting comment on the Tenth Circuit decision but expressing skepticism that the ACC could craft an opt-in CPNI approval regime that would withstand challenge on constitutional and preemption grounds).

[3] AT&T at 4.

is the AT&T position from a legal and policy perspective, in response to a direct question from the ACC regarding whether a company uses an opt-in or opt-out policy (Question 1.a), AT&T advised that it used an opt-in **oral** CPNI approval process beginning in 1996, involving "orally poll[ing] 27 millions residential customers at a cost of $70 million. Overall, 24 million, or 85.9%, of these customers gave their CPNI approval."[4] These assertions are similar to those made by AT&T in its 1998 "Petition for Reconsideration and/or Clarification," filed with the FCC.[5] At that time, Qwest challenged the assertion that all the approvals were "affirmative" in the sense most persons would understand that term.[6]

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[4] *Id.* at 2.

[5] "AT&T Petition for Reconsideration and/or Clarification," *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking,* CC Docket No. 96-115, filed May 26, 1998. A copy of the relevant pages (pp. 18-22) of the AT&T filing are attached as Attachment B. There AT&T claimed that "[f]rom May through February 1998, AT&T has asked 27.9 million customers for permission to use [CPNI and that] [o]verall, 24 million of these customers, or 85.9% gave their approval, while 3.9 million (14.1%) declined to give approval." *Id.* at 20.

[6] "With respect to wireline customers, it appears that AT&T relies on what it describes as express verbal approval. [Cite omitted.] With respect to wireless customers, however, the **express** nature of the approval is less clear. For example, AT&T references language in its service contracts which describes its CPNI uses, including the 'sharing of service usage information with other divisions of AT&T, unless the customer notifies AT&T Wireless Services in writing.' [Cite omitted.] This reads very much like a 'notice and opt out' approval mechanism. Similarly, while AT&T references a 'written agreement' between itself and its business customers, it nowhere explicitly states that the agreement must be signed by the customer (i.e., written approval). Rather, AT&T indicates that the contract can be 'executed' either 'by signing the contract or using the service.' [Cite omitted.] While the former action would result in an express written consent . . . , the latter would not, since it -- like the prior example -- would be in the nature of a notice and opt-out approach." *See* "Support and Opposition of U S WEST, Inc. to Various Petitions for Reconsideration and/or Clarification," *In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer*

In its comments before the ACC, AT&T provides no further elucidation of its approval process than it did before the FCC. Before the ACC relies on AT&T's representations as evidence that "CPNI affirmative approvals can be secured," it should make further inquiry into the facts of the AT&T's approval-process. It appears that some of the approvals were more in the nature of notice and opt-outs.[7] There is a substantial possibility that the ACC would not agree with what AT&T considers "affirmative" approvals.

In contrast to AT&T's assertion that it was able to secure 20+million affirmative approvals from its customers stands Qwest's-filed results from its statistically-valid trial demonstrating that affirmative CPNI approvals cannot be secured in any large numbers. (Attachment 4 to Qwest's Opening Comments submitted in this docket).[8] That study, from which extrapolations and predictions can fairly be made, shows that it is essentially impossible to secure sufficient opt-in CPNI approvals, with the consequences being that

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*Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking,* CC Docket No. 96-115, filed June 25, 1998 at 15, n.36 (emphasis in original), pertinent pages included here as Attachment C.

[7] For example, the language AT&T uses to discuss the wireless customer consents it secured sound similar to that which Sprint acknowledges is an opt-out approach, utilizing a "Terms and Conditions" document. Sprint at 2.

[8] Sprint argues that it would be easier for incumbent carriers to secure CPNI approvals than for new entrants because an incumbent "is more likely to receive calls." Sprint at 3. Sprint is undoubtedly correct as to the raw numbers of calling individuals. But, that does not really address the issue of securing approvals from a customer base of millions of customers or the percentage of approvals secured. Nor does it take into account that the large percentages of approvals secured an **inbound calling** context (because customers have telecommunications needs/services on their minds and are engaged) represent – at least for the Qwest incumbent – only 10 to 15% a year of a carrier's customers and some are repeat callers. In an opt-in CPNI approval process, this leaves incumbents with 85% of their customer base in "no CPNI use" status, an unacceptable result.

CPNI cannot be used. Speech within the corporation is depressed, and the carrier's speech with customers is uneducated. In such circumstances, the opt-in approach to CPNI approvals is contrary to constitutional free speech principles and sound public policy.

### B. Prohibiting CPNI Sharing With BOC Long Distance Affiliate

AT&T claims that a BOC's long distance affiliate, and potential customers of a BOC's local and long distance package, should not enjoy the benefits of informed, constitutionally-protected speech accomplished through affiliate sharing of CPNI.[9] AT&T's argument is two-fold: If a BOC seeks to share its CPNI with a Section 272 Affiliate through an opt-out process, a BOC must notice a customer that it will share CPNI with unaffiliated entities as a result of that opt-out notice, as well. If the BOC wants to avoid this result (*e.g.*, opt-out for sharing with the Section 272 affiliate and others), the BOC must use an opt-in CPNI approval process for sharing with its affiliate and others.

AT&T's argument amounts to a plea that the CPNI approval process be uninfluenced by the ongoing carrier relationship of the BOC and its customers. AT&T's position before the ACC suffers from the same infirmities it did before the FCC.[10] The

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[9] AT&T argues that BOCs "should not be permitted to share with or use for the benefit of their section 272 affiliates their local customer CPNI on a preferential basis. In other words, CPNI must be made available to unaffiliated carriers on the same basis as to the BOC affiliate (whether opt-in or opt-out)." AT&T at 2.

[10] As AT&T's attachment shows, AT&T has made its arguments to the FCC. And, Qwest has filed responsive arguments in opposition to AT&T's rhetoric. For a full record, Qwest here attaches its advocacy on this issue as it has been presented most recently to the FCC. *See* "Comments of Qwest Services Corporation" at Section IV, pp. 22-28 (filed Nov. 1, 2001) (Attachment D) and "Reply Comments of Qwest Services Corporation" at Section III, pp. 19-23 (filed Nov. 16, 2001) (Attachment E), *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications*

argument is anti-consumer, anti-competitive and anti-constitution. In short, AT&T's advocacy is at odds with good law and sound public policy.

AT&T's position would hurt consumers and their privacy interests. Moreover, it would add to their purchase costs were it adopted. It is generally conceded that the primary consumer "privacy" concern is with sharing CPNI with entities unaffiliated with the carrier collecting and generating the information.[11] Thus, establishing a sharing mechanism that treats a carrier's affiliate the same as an unaffiliated entity would compromise those customer expectations. Surely the ACC would not act in such manner.

Additionally, AT&T's arguments would deprive consumers of the benefits that inure to their favor when businesses maximize information flows and the efficiencies associated with them.[12] AT&T would have the government act in a manner that would

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*Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking,* CC Docket No. 96-115. Attachment A to this filing has a "status report" on this issue before the FCC. It is before the FCC where this issue should be resolved.

[11] According to "Privacy On & Off the Internet: What Consumers Want," conducted by Harris Interactive, with Dr. Alan F. Westin acting as Academic Advisor. ("2002 Harris Survey"), "Consumers are most concerned about the threat of their personal information falling into the hands of individuals or companies who have no relationship to them. Consumers indicate that selling personal information to third parties (75%) is by far their greatest concern." Westin Commentary at 31.

[12] It its opening Comments, Qwest advised that the FCC and federal district courts had articulated positions supporting the use of CPNI within a corporate enterprise, asserting that such use promoted the interests of consumers and competition. Qwest at 1-8. As characterized by the District Court of Appeals for the D.C. Circuit, arguments opposing CPNI use within a carrier's corporate enterprise are grounded not in arguments that the use of CPNI will "hurt competition or otherwise adversely affect the public interest, but instead that it will hurt [those arguing for a restriction on use] by increasing the sting of competition [such entities] will face from the . . . company [using the CPNI]. We agree with the Commission . . . that AT&T/McCaw's ability to market its services directly to the customers of other carriers [using CPNI] . . . should lead to lower prices and

interfere with acknowledged consumer benefits associated information sharing within a corporate enterprise (benefits AT&T itself wants to take advantage of through an opt-out CPNI approval process). Moreover, the kind of consumer and competitive benefits referenced by carriers, regulators and courts alike are not dependent on the sharing of information by the one lawfully in possession of the information with other non-affiliated entities.[13]

AT&T's argument, were it adopted, would impede competition not promote it. It would hamstring a new entrant (the BOC) seeking to provide interexchange long distance services when long-standing, name-brand providers with substantial, rich customer information use all of their CPNI to sell both local and long distance services.[14] No good reason exists for the ACC to act as AT&T proposes and to do so would impede the BOC's ability to use CPNI to provide its customers with the best product mix at the best price for those customers. Such action would only frustrate consumer welfare and the benefits of competition.

Finally, AT&T's arguments ignore fundamental constitutional principles regarding BOC to Section 272 affiliate speech and BOC/Section 272 affiliate to customer

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improved service offerings." *See SBC Communications Inc. v. FCC,* 56 F.3d 1484, 1494-95 (D.C. Cir. 1995).

[13] *See Catlin v. Washington Energy Co.,* 791 F.2d 1343, 1345 (9th Cir. 1986).

[14] IXCs have touted the significant volume of CPNI at their disposal – to be used by them in crafting either interexchange or local service offerings. *See* Letter from Elridge A. Stafford, Federal Regulatory, U S WEST to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, dated Jan. 27, 1998, Attached Slides at 10 (Attachment F) "IXC CPNI is no less valuable than LEC CPNI: -- AT&T boasts: "We now have a database with information about nearly 75 million customers. We know their wants, needs, buying patterns, and preferences." -- MCI claims databases that contain more than 300 million sales leads and up to 3,500 fields of information about 140 million customers and prospects."

speech. AT&T encourages the ACC to take action that would unlawfully condition Qwest's exercise of its free speech rights. As Professor Lawrence Tribe advised the FCC, a government mandate that a BOC treat its own affiliate as a stranger for speech purposes (*e.g.*, sharing CPNI between affiliates) or that it treat all other entities as if there were affiliates puts Qwest in an untenable position. The former decision acts as an "involuntary waiver" of the company's speech rights, and the derivative speech rights of its customers, to the detriment both. The latter action would compromise a BOC's customers' privacy expectations. The courts have held that the government cannot lawfully force persons into such a position.[15]

AT&T invites the ACC to intervene in a matter that has been fully vetted at the FCC through at least two separate dockets and more than four rounds of filings. Beyond preemption considerations, the ACC should decline to adjudicate this issue because to do so would be unsound from a matter of law and policy. The consumer and speech benefits associated with CPNI use should not be dampened by restrictions on a carrier's sharing of such information with a particular "type" or "category" of affiliate. For these reasons, the ACC should reject AT&T's arguments that if a BOC shares CPNI with its Section 272 affiliate pursuant to an opt-out notification that unaffiliated entities should also become third-party beneficiaries of that approval process; or, alternatively, that a BOC's affiliate should be treated as if there were no affiliation. Such a ruling would be contrary to

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[15] Attachment G (Letter from Kathryn Marie Krause, Senior Attorney, U S WEST to Mr. A. Richard Metzger *et al.*, June 2, 1997 (attaching Letter to Mr. Richard Metzger *et al.* from Laurence H. Tribe, June 2, 1997, at pp. 12-14, citing to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987))); and *Dolan v. Trigard*, 512 U.S. 574 (1994)); Attachment H (Letter from Kathryn Marie Krause, Senior Attorney, U S WEST to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, Sept. 10, 1997 (attaching Letter to Mr. Richard Metzger *et al.* from Laurence H. Tribe, Sept. 10, 1997, at p. 6)).

consumer welfare and privacy expectations and is not compelled by any sound legal or policy principle.

## III. Residential Utility Consumer Office ("RUCO") Comments

RUCO argues that the Tenth Circuit opinion is just wrong, and that it creates an "unnecessary conflict between individual privacy and allegedly protected 'speech.'"[16] It urges the ACC to adopt the logic of dissenting opinion. The ACC should reject the RUCO's arguments since they are not well grounded in law and they do not promote sound competitive or public interest policy.

RUCO seeks ACC interference with telecommunications carriers and their use of CPNI and to support its entreaty it cites to other state statutes involving releases of information to entities unaffiliated with the holder of the information.[17] The context has little to do with carriers' use of CPNI and raises different privacy "concerns" than does a business' internal use of information lawfully within its possession. Even by analogy,[18]

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[16] RUCO at 1.

[17] *Id.* at 3-4 (citing to statutes dealing with: release of a professional's residential address and telephone number by any professional board; release of a peace officer's identification information, including name and address by state or county officials; release of information about judges, police officers, domestic violence victims or others benefiting from a restraining order; collection or disclosure of social security, credit card or other financial information when collected for judicial purposes; release of information associated with vehicle title or registration records).

[18] *See e.g., id.* at 4 (arguing that "by analogy" the existence of the Arizona Constitutional provision protecting privacy supports the argument that carriers should have to secure affirmative approval to use CPNI); *Id.* at 7 (arguing that carriers should be subject to damages for "tortuous [sic] dissemination of CPNI," referencing again the Arizona Constitution). Both arguments must be rejected. The Arizona courts have construed the Arizona Constitutional provision on privacy to be confined to state interference with privacy, not private ones (Qwest Opening Comments at 9). An extension of this clear judicial precedent would be inappropriate. Additionally, it is clear that the internal use of CPNI for ordinary business purposes does not constitute a tort under Arizona law. *Id.* Similarly, RUCO's reference to the law of contracts is misplaced as an argument by analogy. RUCO at 5. First of all, the statute of frauds does not apply to the relationship

such statutes are inapposite to a carrier's use of CPNI within its corporate enterprise, even from a policy or analogy perspective. Moreover, evidence submitted or referred to by RUCO is not the kind of evidence necessary to sustain a government mandate directed toward a particular set of businesses.

Generalized concerns regarding "privacy,"[19] even if those concerns are escalating,[20] will not support an opt-in CPNI approval regime.[21] To sustain a CPNI opt-

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between Qwest and its customers since the contract can be (and is generally) executed and acted upon within a year. Qwest generally enjoys a month- to- month relationship with its customers pursuant to tariffed terms and conditions. Second, even the law of contracts acknowledges the binding nature of an agreement accomplished pursuant to inaction when the totality of the facts and circumstances support such a conclusion. Restatement (Second) of Contracts § 69 (1979).

[19] For example, "Arizona law recognizes that some people with an ax to grind will access and use personal information to harass or harm others and their families." RUCO at 3. As the Tenth Circuit stated, the government cannot satisfy the *Central Hudson* test by "merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served." *U S WEST v. FCC,* 182 F.3d at 1235.

[20] In information Qwest provided in its opening submission, there was a description of the population according to a privacy "orientation." *See* Attachment 14 to Qwest Opening Comments. The attachment referenced privacy "fundamentalists," "pragmatists" and "unconcerneds." The figures associated with these classes of individuals have changed since the date of the document submitted. According to Harris Survey 2002, privacy "fundamentalists" now constitute about 34% of the population (rather than the 24% figure earlier referenced). The recent data also shows a shift in the Unconcerned category (dropping since 1996 from 12% to 8%) with the movement going to the pragmatists (now at 58%). In addition to this "privacy population framework," this survey also confirms that informational privacy varies considerably by age, gender, education and income. *Id.* at 32-34.

Dr. Westin postulates that these shifts are due to four major factors: First, "[t]he most obvious answer is the continued critical mass media treatment in 2000-2001 on consumer profiling, target marketing, and business information-sharing practices, especially on the Internet. This steady drumbeat shaped and intensified average-consumer concerns, especially for financial and health information uses." Westin Commentary at 23. Second, "the widely-reported rise in identifying theft/fraud, through capture of consumer personal data and weaknesses in some company information-security systems." *Id.* (Compare the RUCO reference to identity theft at 3). Third, "the movement of consumer privacy in 1999 and 2000 onto the mainstream national and local political agenda as a

in approval regime, the ACC must be able to articulate a consumer's privacy interest in CPNI *vis-à-vis* its serving carrier and that would warrant government action. While consumers undoubtedly have a privacy interest in CPNI, it is not clear that the government needs to become unduly involved in the carrier-customer relationship in order to assure that the consumer's interests are handled responsibly.

RUCO points to a carrier's accumulation of call detail information as warranting government intervention.[22] It claims that the "potential harm [to the consumer] is much broader than potential embarrassment."[23] Yet, RUCO fails to articulate or prove the harm, as required under constitutional principles.[24]

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first-tier social concern." *Id.* And, fourth, "the increased lack of public trust in American business that took place . . . in the late 1990's and 2000-2001." *Id.* at 24.

Of these factors, only the latter can be related in any direct way to the behavior of carriers or their customers. And, with respect to telecommunications carriers themselves, the most recent survey contains little specific information about them, other than they are in the middle of the pack in terms of companies that consumers believe need to establish effective privacy policies. Westin Commentary at 65-66. Concerns about privacy, stemming from general environmental factors, and generalized desires for the establishment of privacy policies (which Qwest and other carriers have) cannot form the foundation for depression of constitutional rights and protections.

[21] *U S WEST v. FCC,* 182 F.3d at 1235.

[22] RUCO at 2.

[23] *Id.* at 4.

[24] "In the context of a speech restriction imposed [by the government] to protect privacy [of telecommunications customers] by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict specific and significant harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment or misappropriation of sensitive personal information for the purposes of assuming another's identity." *U S WEST v. FCC,* 182 F.3d at 1235. The Tenth Circuit found that an opt-in CPNI approval regime failed this element of *Central Hudson* (*i.e.*, the specific articulation of a governmental interest) because "[w]hile protecting against disclosure of sensitive and potentially embarrassing personal information may be important in the abstract, [it had] no indication of how it may occur in reality with respect to CPNI." *Id.* at 1237.

RUCO wants the ACC to restrict truthful information lawfully generated and retained by carriers providing telecommunications services. In seeking that restriction, it ignores the fact that call detail was a type of CPNI considered by the Tenth Circuit when it, nonetheless, struck down the FCC's opt-in CPNI approval regime.[25] That Court found that an *opt-out* CPNI approval regime most likely addressed any customer privacy concerns because individuals that objected to the use of such information could protect themselves by "opting-out."

Plainly, the communication of call detail information (time of day, day of week, repeat calls to certain numbers) within a corporate enterprise is as much speech as telling an affiliate that "Susan has 7 lines – 3 more than she had last week and 6 more than she had last month." Use of this information by a carrier in the context of the individual associated with the call detail has not been demonstrated to be highly offensive across a broad base of telecommunications consumers, even though the information might be a reflection that Susan (a) is starting a highly lucrative (but maybe legally questionable) "calling parlor" for those wanting to make overseas 900 calls or (b) just needs a lot more telephone lines for reasons no one cares about. Moreover, the inclusion of this

[25] "Given the sensitive nature of some CPNI, such as when, where, and to whom a customer places calls," Congress afforded CPNI the highest level of privacy protection under § 222." *U S WEST*, 182 F.3d at 1229, n. 1. The court was comparing § 222(c) with other subsections of § 222, such as the provisions dealing with aggregated information. The Court was commenting on the fact that, in the former case, customer "approval" was necessary before a carrier could use CPNI; whereas with respect to aggregate information, no such "high[ ] level of privacy protection" was provided for in the statute. Nor was such protection required in the case of subscriber list information (SLI), as the Court observed. By describing this legislative framework, the Tenth Circuit was not validating a substantial state interest in protecting people from disclosure of such information, particularly not if the disclosure were pursuant to customer approval. Nor did the Court say anything that would suggest that call detail information would warrant a different type of approval process than appropriate for individually-identifiable CPNI generally.

information in databases "used" for other than direct marketing purposes – such as information accumulated for modeling or other purposes that might be used to create marketing strategies for customers who do want to hear from telecommunications carriers – poses no "privacy threat" to any individual. Indeed, as the material submitted to the ACC previously demonstrates, all the above communications and potential information uses create benefits to consumers and businesses in the form of lower product development and marketing costs as well as the proliferation of products and services that can satisfy consumers' telecommunications and related service needs.

RUCO's suggestion that carriers "convert" call detail information into identification information (such that a pizza company was called or a health care or insurance provider)[26] is not supported by sworn statement or any evidence that Qwest is aware of in this or the federal record. Qwest has committed not to use or share 7 or 10-digit call detail (whether associated with local calls, such as measured service, or toll calls) within its corporate enterprise for marketing purposes. Thus, there is no current demonstrable "privacy" concern or harm associated with its use of this information. Although other carriers might not be willing to withhold use of this information, the fact that the information has been used in the past and has not raised or demonstrated privacy issues of any magnitude calls into question the notion that there is a substantial privacy threat associated with internal use of call detail.

Moreover, a CPNI opt-in approval regime with respect to call detail will not be sustainable if (a) it does not materially and directly advance a compelling government

[26] RUCO at 2.

interest in privacy,[27] in (b) a narrowly tailored manner. The existence of other privacy protections, either self-imposed or governmental, must be taken into account in making the determinations about advancement of the government objective and its narrow tailoring. The fact that carriers already have internal systems and practices to protect customer privacy (which would be embellished through an opt-out notification), and that government mandates already exist to "protect" individuals from unwanted marketing contacts (*e.g.*, Do Not Call Lists and marked directories) cannot be ignored by the ACC as it considers the adoption of broad speech-stultifying CPNI mandates as a mechanism to protect consumer privacy. Nor can the fact that individuals are well positioned to act to protect their own interests already and evidence exists that they do so in line with their own individual privacy "concerns."[28] In light of these facts, government mandates that are broad rather than narrow and do indirectly (through the control of information exchanges) what can more easily be done quite directly (controlling marketing contacts through Do Not Contact activity).

It is not difficult to imagine a less constitutionally-invasive government regulation that would curb the kind of information "matching" what RUCO describes as privacy invasive. For example, a regulation might prohibit carriers from matching call detail

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[27] *See* note 1, *supra*.

[28] The Harris Survey 2002 contains facts showing that individuals are becoming more privacy "assertive" without the benefit of any government intervention. "Fundamentalists are more privacy assertive than Privacy Pragmatists, who are much more assertive than Privacy Unconcerned. . . . .Fundamentalists are the most likely to take steps to protect their privacy." Westin Commentary at 45. Persons are increasingly asking that their names be removed from marketing list (an increase of 25% up to a total of 83%); asking that information not be shared with third parties (up by 20 points to 73%); and refusing to give personal information (up 9% points to 87%). *Id.* at 44.

(*e.g.*, telephone number information) to name identifications for marketing purposes.[29] Thus, it is clear that there is a least one way (and maybe more) to craft a less restrictive government CPNI regulation to achieve governmental objectives of protecting customer privacy other than adoption of an opt-in CPNI approval mandate.

## IV. Conclusion

The FCC's position announced it is *CPNI Order* and *CPNI Reconsideration Order* is that a BOC's Section 272 affiliate is part of the corporate enterprise that can use CPNI with appropriate "customer approval."[30] The FCC has construed Sections 222 and 272(c)(1) to be satisfied by this approach. BOCs are on record encouraging the FCC to maintain this position.

However, even if the FCC were to shift its previous statutory construction articulations, carriers have presented compelling arguments that Section 272(g)(3) allows CPNI sharing between BOC Section 272 affiliates and the LEC once "joint marketing" begins. (The FCC has not previously ruled on this argument, since its position was supported by other statutory provisions and public interest factors.) Only through such

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[29] Qwest does not concede that such regulation would be constitutional. However, in efforts to work with the ACC cooperatively, this type of regulation might not be challenged by carriers and might accommodate the ACC's concerns.

[30] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking,* CC Docket No. 96-115, 13 FCC Rcd. 8061, 8174-8179 ¶¶ 160-169 (1998) (*"CPNI Order"*); *Order on Reconsideration and Petitions for Forbearance,* 14 FCC Rcd. 14409, 14480-87 ¶¶ 135-145 (1999) (*"CPNI Reconsideration Order"*). Of course, BOCs, like other LECs, would be required to provide CPNI to any entity the customer directs in writing. 47 U.S.C. § 222(c)(2). Also, BOCs would have to provide CPNI to CLECs authorized to receive it for purposes of pre-ordering, ordering, provisioning, maintenance and repair and billing functions. 47 C.F.R. §§ 51.5, 51.319(g).

interpretation can the FCC advance what it asserts is Congress' intent: that once Section 271 relief is granted, "the BOC[s] [should] be permitted to engage in the same type of marketing activities as other service providers."[31]



[31] *See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21895, 22046 ¶ 291 (1996).

TAB A

**ATTACHMENT A**

CPNI SHARING BETWEEN A BOC AND ITS SECTION 272 AFFILIATE
STATUS OF ISSUE AT THE FCC

The FCC's position announced it is *CPNI Order* and *CPNI Reconsideration Order* is that a BOC's Section 272 affiliate is part of the corporate enterprise that can use CPNI with appropriate "customer approval."[1] The FCC has construed Sections 222 and 272(c)(1) to be satisfied by this approach. BOCs are on record encouraging the FCC to maintain this position.

However, even if the FCC were to shift its previous statutory construction articulations, carriers have presented compelling arguments that Section 272(g)(3) allows CPNI sharing between BOC Section 272 affiliates and the LEC once "joint marketing" begins. (The FCC has not previously ruled on this argument, since its position was supported by other statutory provisions and public interest factors.) Only through such interpretation can the FCC advance what it asserts is Congress' intent: that once Section 271 relief is granted, "the BOC[s] [should] be permitted to engage in the same type of marketing activities as other service providers."[2]

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[1] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking,* CC Docket No. 96-115, 13 FCC Rcd. 8061, 8174-8179 ¶¶ 160-169 (1998) (*"CPNI Order"*); *Order on Reconsideration and Petitions for Forbearance,* 14 FCC Rcd. 14409, 14480-87 ¶¶ 135-145 (1999) (*"CPNI Reconsideration Order"*). Of course, BOCs, like other LECs, would be required to provide CPNI to any entity the customer directs in writing. 47 U.S.C. § 222(c)(2). Also, BOCs would have to provide CPNI to CLECs authorized to receive it for purposes of pre-ordering, ordering, provisioning, maintenance and repair and billing functions. 47 C.F.R. §§ 51.5, 51.319(g).

[2] *See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21895, 22046 ¶ 291 (1996).

TAB B

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of<br><br>Implementation of the Telecommunications Act of 1996<br><br>Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information | CC Docket No. 96-115 |

**AT&T PETITION FOR RECONSIDERATION AND/OR CLARIFICATION**

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Its Attorneys

May 26, 1998

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## IV. THE COMMISSION SHOULD GRANDFATHER EXISTING APPROVALS OBTAINED BY CARRIERS IN GOOD FAITH PRIOR TO RELEASE OF THE CPNI ORDER.

The *CPNI Order* requires a carrier to obtain express written, oral or electronic approval before the carrier may use CPNI to market services outside the existing customer-carrier subscription relationship. *CPNI Order*, para. 32; Section 64.2007(a). A solicitation for approval must be preceded by a detailed notice of rights. *CPNI Order*, paras. 127-40; Section 64.2007(f). To further efficiency and avoid customer confusion, the Commission should clarify that its CPNI rules have prospective application only and that AT&T may continue to rely on the express approvals it obtained from customers, consistent with the provisions of Section 222(c)(1) of the Act, prior to release of the *CPNI Order*.

Before the Commission released its *CPNI Order* more than two years after the 1996 Act was enacted, the only direction regarding the acquisition of approvals under Section 222(c)(1) was in the Act itself which stated that "with the approval of the customer," a carrier could use CPNI for purposes other than set forth in that section. AT&T relied on that statutory provision. Indeed, in the *CPNI Order*, the Commission specifically concluded "that the term 'approval' in Section 222(c)(1) is ambiguous because it could permit a

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(footnote continued from previous page)

program. From there, it would be easy to determine if the proper procedures were followed.

variety of interpretations." *CPNI Order*, para. 8 . And, as the Commission acknowledged, "carriers were not required, in most cases, to provide notification of CPNI rights under our pre-existing requirements." *CPNI Order*, para. 136. AT&T acted in good faith in acquiring its pre-*CPNI Order* approvals, relying on a federal statute that, according to the FCC's own findings, was capable of various interpretations. Neither AT&T nor consumers should suffer from that ambiguity so long as AT&T acted reasonably -- as it did -- in acquiring those approvals.

Beginning in May 1996, AT&T's consumer services division set out to obtain CPNI permission from its customers. CPNI approval was solicited verbally, while the customer was on the phone with AT&T in the normal course of business. Scripting was given to customer care associates who respond to inbound calls, as well as to AT&T telemarketing representatives who handle both inbound and outbound contacts. Over the past two years, five different scripts have been used, in an effort to make the request more customer-friendly, that is, easier to understand.[9]

From May 1996 through February 1998, AT&T has asked 27.9 million customers for permission to use their personal

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[9] For example, one the scripts used was the following: "We would like to tell you about other AT&T products and services from time-to-time. To help us do this, may AT&T have your permission to review your account information." See Appendix A (for language of other scripts used).

account information to offer them products and services that may be of interest to them. Overall, 24 million of these customers, or 85.9% gave their approval, while 3.9 million (14.1%) declined to give approval. Although the precise wording of the scripts used by AT&T does not meet the detailed requirements of the subsequent *CPNI Order*, the non-trivial percentage of individuals who said "No" is an extremely strong indication that, consistent with the Commission's objective, customers understood AT&T's explanation, understood their rights and -- where it was given -- consent was informed.

AT&T's statisticians advise that had only 1 in 10,000 customers said No, it would have been too small a percentage to be reliable, and rather than a strong indication of approval, most likely the customers would not have understood the question. In this case, however, there was a very significant portion of the population on each side of the question, such that the Commission can safely conclude that customers really meant what they said. AT&T incurred $70 million in expenses to obtain these approvals and denials, and likely would have to incur at least that amount to resolicit these customers. It would be an incredible waste of resources and *irritating* to customers who had already given consent for AT&T to contact them again for their approval. Thus, cost is not the primary reason AT&T seeks to have these permissions grandfathered.

It is quite apparent that these customers understood the difference between a "Yes" and "No" answer, that their

consent was asked for in good faith, and given freely. Privacy research and the record in this docket confirm that customers overwhelmingly wish to receive relevant information about AT&T products and services, and are willing to have internal computers search their records to make them relevant offers. Those who do not feel this way can knowingly decline approval, as they have done in the CPNI solicitations to date.

Not only would there be unnecessary expense for AT&T, but it would be both confusing and annoying for the consumer if AT&T were to go back to the same customers already polled on this issue. Accordingly, the CPNI permission already granted should remain in force. To ameliorate any possible concern that these customers receive full notice of their CPNI rights, as contemplated in the *CPNI Order*, before using these consents, AT&T would send customers who had given approval prior to the release date of the Order, a full written notice of their rights, including an explanation that they have a right to withdraw their approval should they wish to do so.

For similar reasons, AT&T also requests that the CPNI approvals obtained from its wireless customers be grandfathered. Again, these approvals were obtained using the Act as a guidepost prior to the release of the *CPNI Order*. Language in AT&T cellular service contracts provides that the customer approves of sharing of service usage information with other divisions of AT&T, unless the customer notifies AT&T Wireless Services in writing. For business customers, the

terms of the contract are specifically negotiated, and, for consumers, this term is part of the written agreement provided to the customer prior to making a decision to enter into a contract for wireless service. This provision, just like the provisions that indicate that the customer will pay a bill when rendered or pay interest on past due amounts, or agree that AT&T can modify the customer's rates on advance notice, are part of the contract to which the customer agrees by signing the contract or using the service. In these circumstances, AT&T should be permitted to continue to rely on the consents previously obtained using this form of contract before the CPNI rules were published.

## V. THE COMMISSION SHOULD CLARIFY, AT A MINIMUM, THAT ANY ADDITIONAL STATE NOTIFICATION REQUIREMENTS WILL HAVE PROSPECTIVE APPLICATION ONLY.

Despite the fact that the FCC's *CPNI Order* recognizes that Section 222 extends to both the interstate and intrastate use of CPNI and prescribes a highly detailed set of requirements as to the contents of the notice, it declines to preempt the states and expressly notes that a state could require additional information to be included in a carrier's CPNI notice. *CPNI Order*, paras. 15-18.

The Commission should revisit this conclusion and hold that the FCC notice requirements are preemptive and that a state may not prescribe additional notice requirements. A failure to so hold could put carriers at peril of expending millions of dollars in soliciting customer approval only to find that the notice does not comply with after-the-fact

TAB C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554



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| In the Matter of | ) | |
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| Implementation of the | ) | CC Docket No. 96-115 |
| Telecommunications Act of 1996: | ) | |
| | ) | |
| Telecommunications Carriers' Use of | ) | |
| Customer Proprietary Network | ) | |
| Information and Other Customer | ) | |
| Information | ) | |

# SUPPORT AND OPPOSITION OF U S WEST, INC. TO VARIOUS PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION

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June 25, 1998

around a short, self-effectuating statute, the Commission must flat-out hold that Section 222 controls all issues involving customer information, be it CPNI, BNA, SLI or whatever and that Section 272 has no applicability to such information (i.e., that name, address and telephone number information is not "all other information" as that phrase was used in the CPNI Order).[34]

C. The Only Section 222 Customer Approvals That Should Be Grandfathered Are Those In Writing, Which Approximate A Customer Designation Similar to Section 222(c)(2)

AT&T argues that those Section 222(c)(1) approvals secured before the release of the FCC's CPNI Order should be "grandfathered."[35] AT&T seeks this relief with respect to both wireline and wireless customers, both residential and business.[36] AT&T's request should be denied except for those customer "approvals" secured by AT&T in writing.

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[34] CPNI Order n.573.

[35] AT&T at 18-22.

[36] AT&T's commentary with respect to its securing of approvals is oblique. With respect to wireline customers, it appears that AT&T relies on what it describes as express verbal approval. Id. at 18-19. With respect to wireless customers, however, the **express** nature of the approval is less clear. For example, AT&T references language in its service contracts which describes its CPNI uses, including the "sharing of service usage information with other divisions of AT&T, unless the customer notifies AT&T Wireless Services in writing." Id. at 21. This reads very much like a "notice and opt out" approval mechanism. Similarly, while AT&T references a "written agreement" between itself and its business customers, it nowhere explicitly states that the agreement must be signed by the customer (i.e., written approval). Rather, AT&T indicates that the contract can be "executed" either "by signing the contract or using the service." Id. at 22. While the former action would result in an express written consent (acceptable under the Commission's existing rules if preceded by the prescribed notifications), the latter would not, since it -- like the prior example -- would be in the nature of a notice and opt-out approach.

As AT&T itself recognizes, citing to the Commission's own correct observation, Section 222(c)(1) is capable of varying interpretations. One of those interpretations is that customers have tacitly (via implying) approved of carrier use of CPNI with respect to all basic telecommunications services (Section 222(c)(1)(A)), and those CPE and information services necessary to or used in connection with such basic services (Section 222(c)(1)(B)). **Indeed, this was AT&T's advocacy throughout this proceeding.** And, such an interpretation would not require the seeking or securing of express approvals at all.

Only as a result of the FCC's CPNI Order is implied approval insufficient as permissible approval under the statute. Similarly, only as a result of the FCC's CPNI Order is express approval not preceded by prescribed "notifications" insufficient as permissible approval under the statute.

Either the Commission should "grandfather" all approval theories and efforts, requiring carriers to seek its prescribed "express" approval only with respect to new customers, or the Commission should refuse to "grandfather" carrier approvals, with one exception. In those cases where a customer actually signed a document designating the use of CPNI by a carrier, the approval should be grandfathered, even though the approval might not have contained the full panoply of Miranda-type[37] notifications the FCC now requires.

Confirming the propriety of such approach is the Bureau's recent "clarification" of the Commission's CPNI Order addressing those BOC customers

[37] GTE at 40 n.69.

who have already provided written customer approval for use of CPNI with respect to enhanced services and CPE.[38] The Bureau determined that such customers need not be re-approached for additional express approval to use CPNI with respect to those services regarding which the customers already provided written consent.

This is clearly the right result since a "written designation" from a customer is substantial proof of a customer desire to have CPNI be used. Indeed, Section 222(c)(2) requires carriers to comply with such customer designations regardless of whether there was any predicate notification. At least two courts have held that such written designation constitutes the "law" with respect to providing CPNI to the customer's designee.[39]

While U S WEST does not here advocate that Section 222(c)(2) controls the sharing of information among affiliates,[40] it provides a sound comparison for analysis. The lesson is that a customer written document, proffered even in the absence of detailed notifications, should absolutely be sufficient consent under the

---

[38] Bureau Clarification Order ¶ 10. Such customers would be those with over 20 lines.

[39] See Pacific Section 222 Case (cited in note 23, supra) and AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company, No. A96-CA-397 SS, Order, Oct. 4, 1996 (W.D. Texas). And see CPNI Order ¶ 165 (Section 222(c)(2) means that carriers "must provide [CPNI] access when the customer says so".) By this advocacy, U S WEST is not conceding that Section 222(c)(2) is applicable to the transfer of CPNI within a single corporate enterprise, even though the Courts discuss the statutory subsection as if it does. See note 40 immediately below.

[40] The Commission's CPNI Order repeatedly uses the phrase "disclose" and "disseminate" with regard to intra-corporate enterprise sharing. See, e.g., CPNI Order ¶¶ 35, 51, 94, 144, 161, 189. This linguistic gloss compromises the generally-understood language of commercial information practices. Disclosures and disseminations are generally made to third parties; sharing generally occurs between or among affiliates.

statute to warrant a finding of (c)(1) approval, regardless of the Commission's newly-prescribed notification obligations.

D. The Commission Should Not Differentiate Between Carriers For Purposes Of Section 222 Implementation

A number of carriers, both LECs and other carriers, seek to create exemptions for themselves from the burdensome CPNI rules. At the same time they seek "special" treatment, they leave large ILECs potentially subject to the Commission's rules, either on the grounds that such ILECs have sufficient resources to accommodate the rules or under a theory that the putative "dominance" of those carriers requires they be burdened by more onerous CPNI rules than "competitive carriers." The Commission should reject these entreaties.[41] They are found neither in law (i.e., the statutory language of Section 222) nor public interest (i.e., privacy protection).

For example, the Commission should reject the advocacy of those who seek to imposed electronic audit controls only on "large" carriers or only on "incumbent" carriers.[42] Certainly, the statute is silent on the need for such controls at all. But,

[41] By this, U S WEST does not mean to say that the Commission should not, in appropriate circumstances, forbear from application of its rules or grant waivers of its rules where the facts warrant. We merely mean that neither size nor market penetration *per se* warrant "exemptions" from the Commission's CPNI rules. This is particularly the case where the "costs" of compliance are large (and will undoubtedly impact the cost/pricing structure of those on whom the obligations are imposed) and the sensitivity to price is increasingly a market driver.

[42] LCI at 6-7 n.14 (arguing that electronic audit controls should be required of ILECs but not competitive carriers). See also Omnipoint at 13-15 (arguing that the electronic auditing/flagging safeguards might be warranted for larger or incumbent carriers but not competitive carriers, without ever explicitly arguing that such requirements should be imposed on large or incumbent carriers).

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of | ) | |
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| Implementation of the Telecommunications Act of 1996 | ) | CC Docket No. 96-115 |
| | ) | |
| Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information | ) | |
| | ) | |
| Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended | ) | CC Docket No. 96-149 |

# COMMENTS OF QWEST SERVICES CORPORATION

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November 1, 2001

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**COMMENTS OF QWEST SERVICES CORPORATION**

Pursuant to the Federal Communications Commission's ("Commission" or "FCC") request for comment with respect to its *Second Further Notice of Proposed Rulemaking* ("*Second Further Notice*")[2] in the above-captioned proceedings, Qwest Services Corporation ("Qwest") respectfully submits these comments on a constitutionally sound Customer Proprietary Network Information ("CPNI") approval process. Only an opt-out CPNI approval process accommodates constitutional considerations, customer privacy interests and legitimate commerce.

[1] The *Second Further Notice* states that parties should make filings in this proceeding in CC Docket 99-273 (*see Second Further Notice* ¶ 32), despite the fact that the caption of the proceeding does not reference such docket. Qwest assumes this is simply a typographical error.

[2] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket Nos. 96-115 and 96-149, *Second Further Notice of Proposed Rulemaking,* FCC 01-247, rel. Sep. 7, 2001.

## I. INTRODUCTION AND SUMMARY

This proceeding was necessitated by the opinion issued by the Tenth Circuit Court of Appeals[3] at the conclusion of its review of the Commission's 1998 *CPNI Order*.[4] In that opinion, the Court held that the CPNI regulations adopted by the Commission "violate[d] the First Amendment" to the United States Constitution.[5] Accordingly, the Court "vacate[d]" those regulations.[6]

The Tenth Circuit's decision makes clear that the Commission's discretion is subject to significant constitutional restraints. Under that decision, the issue is whether, consistent with the Constitution, the government may prohibit carriers from exercising their First Amendment right to provide truthful information to customers, and deny to customers their First Amendment right to receive such information, absent compliance with mandated and burdensome procedures that purport to evidence customer approval to use CPNI as a foundation for such communications.

Under a proper reading of the Tenth Circuit's opinion -- which (a) emphasized the "important civil liberties"[7] that were "abridge[d]" or "restrict[ed]"[8] by the mandatory opt-in process, (b) expressed serious "doubts" whether either of the "government interests" proffered

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[3] *U S WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (June 5, 2000) (*"U S WEST v. FCC"*).

[4] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061 (1998) (*"CPNI Order"*).

[5] *U S WEST v. FCC*, 182 F.3d at 1228, 1239.

[6] *Id.* at 1240.

[7] *Id.* at 1228.

[8] *Id.* at 1232.

by the Commission were "substantial,"[9] and (c) concluded in all events that the regulations were not "narrowly tailored" to minimize the burden on protected speech[10] -- the type of CPNI approval process sustainable under the Constitution is not a close question. The First Amendment interests at issue here dictate that the "burden" of overcoming inertia be placed not on truthful speakers and interested listeners, but on those unquantified members of the intended audience who prefer not to receive communications based on information provided to, or generated by, their chosen carriers.

A subsidiary question raised by the *Second Further Notice* is whether, in light of the constitutional hurdles to the adoption of an opt-in CPNI approval procedure, the Commission should revisit and reverse its prior determination that Section 272 of the Act '"does not impose any additional CPNI requirements on BOCs' sharing of CPNI with their Section 272 affiliates."'[11] The answer to that question is clearly "no," as the Commission must have realized when it took agency action on CPNI approvals subsequent to the Tenth Circuit's vacatur of the opt-in requirement.[12] In addition to raising First Amendment implications similar to those that

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[9] *Id.* at 1235 (doubts regarding privacy interests), 1236-37 (skepticism about competitive interests).

[10] *Id.* at 1238-39.

[11] *Second Further Notice* ¶ 25 and n.60 (quoting from and citing to the *CPNI Order* and *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd. 14409 (1999) ("*CPNI Reconsideration Order*")).

[12] In September, 1999 -- weeks after the Tenth Circuit handed down its opinion in *U S WEST v. FCC* -- the Commission confirmed its prior conclusion that Section 222 controlled CPNI use as between the BOC and its Section 272 affiliate. *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 137. And, in October, 2000 -- almost a year after the Tenth Circuit's decision, the Commission reiterated its decision that Section 222 controlled matters pertaining to CPNI for a variety of reasons. *See In the Matter of AT&T Corp. v. New York Telephone, d/b/a Bell Atlantic – New*

caused the Tenth Circuit to invalidate the Commission's CPNI opt-in regulations, replacing "opt-in" regulations with additional CPNI burdens or restrictions on BOCs would frustrate Congress' express endorsement of BOC joint marketing found in Section 272(g)(3).[13] Competitors' claims that BOCs benefit unfairly if they can use CPNI in truthful marketing of their products are overstated and, in all events, insufficient to justify further restrictions on joint marketing educated by CPNI.

The judicial framework of the Tenth Circuit opinion all but proscribes governmental action that would extend beyond an opt-out CPNI approval process for carrier-to-customer speech and carrier-to-carrier communications.[14] Even in other contexts, such as disclosures of CPNI to third parties, crafting a narrowly-tailored opt-in requirement poses formidable legal challenges for the Commission, particularly in light of the fact that the Commission itself has acknowledged the legitimacy of these types of information disclosures.[15]

There are two CPNI approval models that could accommodate the constitutional limitations articulated by the Tenth Circuit. The first is a model that allows carriers to decide the most appropriate CPNI approval model suitable to their situation and their customer

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*York*, 15 FCC Rcd. 19997, 20004-05 ¶¶ 18-19 (2000) (*"AT&T/Bell Atlantic Complaint"*). *See also* Section IV.A., *below*.

[13] 47 U.S.C. § 272(g)(3). *And see AT&T Corp. v. FCC*, 220 F.3d 607, 632 (D.C. Cir. 2000). *See also* Section IV.B., *below*.

[14] In 1999, Congress revised Section 222 to include an affirmative express approval requirement with respect to wireless location information. Pub. L. No. 106-81, enacted Oct. 26, 1999, 113 Stat. 1286, amending the Communications Act of 1934, 47 U.S.C. §§ 222, 251. *And see Second Further Notice* ¶ 22 and n.51. Qwest takes no position at this time on the lawfulness of the statutory amendment. As the Tenth Circuit noted, a critical factor in assessing the constitutionality of an opt-in provision is the costs and benefits associated with the implementation of the regime. *U S WEST v. FCC*, 182 F.3d at 1238-39. To the extent the Commission implements the Congressional mandate with respect to wireless location information, the constitutionality of the statutory requirement will be for the Court to decide, based on the law as applied to the record before the Commission.

constituency. This approach avoids government compulsion, minimizes burdening First Amendment rights and shifts the responsibility of crafting fair CPNI approval processes to carriers.[16] Carriers would, of course, be subject to government enforcement actions should they fail to craft reasonable processes.

An alternative model would have the Commission promulgate a narrowly-tailored CPNI approval rule. Such rule might entail two components. First, that carriers advise the Commission of the CPNI approval model they chose. Second, that carriers provide the Commission with documents associated with any notifications that carriers included in their approval process.[17] Qwest supports leaving the decisions on CPNI approval processes to carriers, but appreciates that some might find a more formal regulatory approval model in the public interest. Any Commission rule would, however, implicate protected speech and would have to conform to constitutional protections.

## II. THE TENTH CIRCUIT'S DECISION FORECLOSES THE APPLICATION OF GOVERNMENT-MANDATED CPNI OPT-IN APPROVAL PROCESSES TO PROTECTED SPEECH

### A. Future Judicial Review Is Unlikely To Sustain An Opt-In Mandate

Portions of the *Second Further Notice* suggest that "a more complete record on consent mechanisms"[18] can provide the requisite foundation for the Commission to re-adopt an opt-in

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[15] *See* Section II.B.4, *below*.

[16] This approval model appropriately accommodates the Constitution as well as Congress' express direction to carriers in Section 222, *i.e.*, "[e]xcept as required by law or with the approval of the customer, a telecommunications carrier . . . shall only use, disclose, or permit access" to CPNI according to certain requirements. 47 U.S.C. § 222(c)(1). *And see* Section II.A., *below*.

[17] Not all approval processes will require "notifications." If a carrier is a single product supplier, under the Commission's approval approach, that carrier already has approval from the customer to use the CPNI and no further notification would be necessary.

[18] *Second Further Notice* ¶ 16.

requirement. Any such suggestion is foreclosed by a careful reading of the Tenth Circuit's decision.

Most fundamentally, the Court's decision was not about a failure of "reasoned decisionmaking," the absence of "substantial evidence," or any of the other deferential standards that typically apply to review of agency orders. Rather, the Court held that opt-in CPNI approval requirements -- regardless of the substance of the agency record -- implicate fundamental First Amendment considerations and rights,[19] and thus are subject to the rule of "constitutional doubt."[20] In light of these considerations and rights, the Court struck down the Commission's CPNI rules, expressing doubt that the rules were supported by any reasonable demonstrated governmental privacy or competitive interest and skepticism that they promoted in any direct or material way legitimate government objectives. Nevertheless, the Court gave the Commission the benefit of the doubt and still it found that the CPNI rules "violate[d]" the First Amendment,[21] because they were not narrowly tailored. The Court therefore "vacate[d]" the regulations.[22] While not "advocating" a particular CPNI approval process,[23] had the Court believed there was a realistic possibility the Commission could on remand justify the restriction on protected speech

[19] *U S WEST v. FCC*, 182 F.3d at 1228 ("this case is a harbinger of difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public sidewalks. In the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked. Policing the boundaries among constitutional guarantees . . . is at the heart of [the Court's] responsibility.").

[20] *Id.* at 1231.

[21] *Id.* at 1228, 1239.

[22] *Id.* at 1240.

[23] *Id.* at n.15

imposed by the opt-in process, it could simply have remanded the case back to the Commission without vacating the regulations.[24]

Although the Tenth Circuit's decision may not literally enjoin the Commission from re-adopting an opt-in CPNI approval process at the conclusion of this proceeding, it is clear that proponents of such government mandate will bear a heavy burden on appeal. Unlike other cases involving review of agency regulations, given the already established "serious constitutional questions" associated with a governmentally-mandated CPNI opt-in approval process,[25] the Court will review the record *de novo* and the Commission's conclusions. That judicial review will not be confined to whether the Commission considered First Amendment issues or whether it considered the propriety of an opt-out regime as well as an opt-in one. Rather, the Court will review the Commission's actions with a view to avoiding "serious constitutional problems," "ow[ing] the FCC no deference, even if its CPNI regulations are otherwise reasonable, and will apply the rule of constitutional doubt."[26] The Commission must reach the right conclusion to have a governmentally-mandated opt-in CPNI approval process -- or any CPNI approval rules -- upheld.

B. The Tenth Circuit's Analysis

Any doubt that a decision to retain the opt-in process would have difficulty surviving appellate review is foreclosed by a careful reading of the Court's decision. The Tenth Circuit made clear that both speech between carriers and their customers and speech within a carrier

[24] The Tenth Circuit plainly knows the difference between a vacatur and a remand, as evidenced by its decision remanding, but not vacating, the Commission's universal services rules. *See Qwest Corporation v. FCC*, Case Nos. 99-9546, *et al.*, 258 F.3d 1191 (10th Cir. 2001). *And see Qwest Corporation v. FCC,* Case Nos. 99-9546, *et al.*, *Order of Clarification*, filed Aug. 27, 2001 (10th Cir.).

[25] *U S WEST v. FCC*, 182 F.3d at 1231.

[26] *Id.*

enterprise constitute commercial speech.[27] In reviewing the constitutionality of government intrusions on such speech, the Tenth Circuit was correctly guided by the principles of *Central Hudson*.[28] A review of those principles demonstrates the heavy burden the Commission will bear defending any CPNI opt-in mandate.

1. The Nature of the Government's Interest

a. Privacy

The Tenth Circuit expressed substantial doubt that the Commission could articulate a legitimate governmental privacy interest that would support opt-in CPNI approval regulations. While the Court conceded that "in the abstract" privacy may constitute a legitimate and substantial governmental interest, it had considerable "concerns about the proffered justifications" particularly in light of the fact that "privacy . . . is multi-faceted."[29] The Tenth Circuit laid out the government's burden to justify its interest in the following language:

> In the context of a speech restriction imposed to protect privacy by keeping certain information confidential, the government must show that the dissemination of the information desired to be kept private would inflict **specific** and **significant** harm on individuals, such as undue embarrassment or ridicule, intimidation or harassment, or misappropriation of sensitive personal information for the purposes of assuming another's identity.[30]

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[27] *Id.* at 1230, 1232 (carrier-customer speech); 1230 and n.2, 1233 n.4 (addressing carrier enterprise speech).

[28] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) ("*Central Hudson*"). As outlined by the Tenth Circuit, assuming the lawfulness of the speech under consideration (a predicate factor), "the government may restrict the speech only if it proves: '(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.'" *U S WEST v. FCC*, 182 F.3d at 1233 (referencing *Central Hudson*, 447 U.S. at 564-65).

[29] *U S WEST v. FCC*, 182 F.3d at 1234.

[30] *Id.* at 1235 (emphasis added).

Nothing about the *Second Further Notice* suggests the Commission could successfully articulate different informational privacy justifications for opt-in CPNI approval rules than it has done in the past,[31] for at least two reasons. First, the Tenth Circuit acknowledged the Commission's concern about CPNI possibly being "sensitive" to some customers,[32] yet expressed doubts that such interest was "substantial" in light of the openness of our society and ready access to information.[33] Second, despite the Court's doubts about the legitimacy of the government's proffered privacy interest, the Court gave the Commission the benefit of the doubt and assumed the Commission had met its burden on this element of the *Central Hudson* test.[34] It is unlikely that a court reviewing opt-in CPNI rules in the future would proceed as generously with respect to the Commission's burden of proof as did the Tenth Circuit. For this reason alone, the Commission should avoid this path.

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[31] The Commission questions whether it can claim that a legitimate government interest advanced by Section 222 is to limit marketing contacts by carriers to their customers. *Second Further Notice* ¶ 17. Given Congress' enactment of Section 227 and the Commission's implementing rules (47 C.F.R. § 64.1200), which expressly deal with marketing contacts, it is unlikely that this "interest" would be found to be a substantial governmental interest under Section 222.

[32] *U S WEST v. FCC,* 182 F.3d at 1235 (quoting from the Commission's *CPNI Order* ¶¶ 2, 94).

[33] *Id.* ("Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. ~~A general level of discomfort from knowing that people can readily access information about us~~ does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm.").

[34] *Id.* at 1235-36 ("notwithstanding our reservations, we assume for the sake of this appeal that the government has asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information"), 1238 ("[e]ven assuming, arguendo, that the state interests in privacy and competition are substantial and that the regulations directly and materially advance those interests" the rules are not properly tailored) 1239 ("even assuming that respondents met the prior two prongs of *Central Hudson*, we conclude that based on the record before us, the agency has failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests").

b. Competitive Interests

The Tenth Circuit expressed even greater skepticism that, in the context of CPNI, competition was a substantial governmental interest.[35] Because it disposed of the case on other grounds, however, it cautioned that "the interest . . . in protecting competition . . . is insufficient by itself to justify the CPNI" affirmative approval regulations under *Central Hudson*.[36] The Court's decision should not be read to suggest that the Commission may couple an ostensible legitimate government interest (such as privacy) with a government interest in competition and thereby enhance the competitive interest itself to a "substantial" one. Quite the contrary.

Moreover, in this particular case, the Commission cannot successfully defend burdensome CPNI approval rules for BOCs on some theory purporting that use of CPNI by a BOC's Section 272 affiliate would be anticompetitive.[37] The Commission's own advocacy and regulatory findings confirm just the opposite -- that sharing of CPNI between affiliates is pro-competitive, even in the absence of a customer approval requirement.[38] Any attempt to revise

[35] *Id.* at 1238 (assuming that advancement of competitive interests was substantial).

[36] *Id.* at 1239 n.13.

[37] *Compare* the Commission's discussion that "under an opt-in approach, the CPNI requirements operate to make a carrier's anti-competitive use of CPNI more difficult [without ever articulating what that use might be] by prohibiting carriers from using CPNI unless and until they have obtained affirmative customer approval" (*Second Further Notice* ¶ 26) and its conclusion that it would "likely have to revisit its interpretation of the interplay between Sections 222 and 272 were it to adopt an opt-out approach." *Id.*

[38] *See In re Applications of McCaw and AT&T Co., Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd. 11786, 11792 (1995) ("we expect that permitting AT&T to disclose the information at issue to its cellular affiliates will increase competition for cellular customers as those affiliates, BOC cellular affiliates, and other providers seek to improve service and/or lower prices to attract and retain customers"); *In the Matters of Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order*, 2 FCC Rcd. 3072, 3094 (1987) ("*Phase II Order*") and *Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration*, 4 FCC Rcd. 5927, 5929-30 (1989) ("*Phase II Further Reconsideration Order*"), *vacated on other grounds, People of State of Cal. v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (restrictions on CPNI are not necessary to protect

regulatory precedent to impede the benefits of information sharing between a BOC and its Section 272 affiliate -- and the ultimate beneficiaries of that sharing, customers -- would be ripe for judicial reversal under a *Central Hudson* analysis.[39]

2. Direct and Material Advancement of the Government's Interest

For the Commission to re-impose an opt-in requirement for CPNI approvals, it must overcome the Tenth Circuit's finding that "[t]he government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation that harm to privacy and competition for new services will result if carriers use CPNI."[40] The Court faulted the Commission for failing to provide evidence of how a breach of privacy might "occur in reality" with respect to CPNI -- either in the context of a carrier's use within its corporate enterprise or with respect to third-party disclosures.[41]

In light of the constitutional significance of any opt-in requirement, proponents of such approval process must meet the existing strong and factual record[42] in kind -- with facts and data.

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competition). *And see SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1495 (D.C. Cir. 1995) (agreed that allowing the sharing of CPNI would create an environment that would "lead to lower prices and improved service offerings"). *See also* Brief for Petitioner and Intervenors, *U S WEST, Inc. v. FCC*, No. 98-9518 (10th Cir. Aug. 13, 1998), at 4-9 (reciting numerous situations in which the Commission has made such remarks and observations).

[39] Additional reasons why the Commission should not impose such burdens are addressed below in Section IV.

[40] *U S WEST v. FCC*, 182 F.3d at 1237. *See also id.* at 1239.

[41] *Id.* at 1237-38 ("By its own admission, the government is not concerned about the disclosure of CPNI within a firm. . . . Yet the government has not explained how or why a carrier would disclose CPNI to outside parties, especially when the government claims CPNI is information that would give one firm a competitive advantage over another. . . . [T]he FCC can theorize that allowing existing carriers to market new services with CPNI will impede competition for those services, but it provides no analysis of how or if this might actually occur.").

[42] Attached, Qwest incorporates the briefs filed before the Tenth Circuit as part of this filing. Attachment A, *Brief for Petitioner and Intervenors (see* note 38, *supra);* Attachment B, *Reply Brief for Petitioner and Intervenors* (*U S WEST, Inc. v. FCC*, No. 98-9518 (10th Cir. Oct. 15, 1998)). These briefs express advocacy Qwest believes is salient with respect to the

What commentors might "think" about customer expectations or behavior, or arguments about how opt-in mandates would constitute "best regulatory policy," will prove insufficient in a future First Amendment challenge unless those arguments identify specific consumer harms and document how an opt-in regime will eliminate them in a manner that is narrowly tailored and appropriately balances costs and benefits.[43]

3. Narrowly Tailoring an Affirmative CPNI Approval Mandate

Should the Commission attempt to re-institute an opt-in CPNI approval process, it will have to refrain from speculation and attend to demonstrated evidence about consumer expectations and conduct. As the Tenth Circuit correctly stated when it rejected the Commission's prior opt-out CPNI approval process, the Commission "merely speculate[d] that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so."[44] It is unlikely that the Commission can produce any solid evidence to support its speculation, particularly in light of the current record evidence that individuals know and understand opt-out processes and use them.[45] Even more significantly in the current context, the Commission is highly unlikely to be able to rebut the current record evidence that the particular constituency that is familiar with opt-out

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Commission's *Second Further Notice*, as well as substantial references to the existing record and the legal principles that must be reconciled with any future Commission action.

[43] *U S WEST v. FCC*, 182 F.3d at 1235, 1238-39 (cost/benefit analysis required, and the costs may include real costs as well as societal costs of depressing information flows).

[44] *Id.* at 1239 ("Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.").

[45] *See also Public Attitudes Toward Local Telephone Company Use of CPNI:* Report of a National Opinion Survey, conducted November 14-17, 1996, by Opinion Research Corporation, Princeton, N.J.. and Prof. Alan F. Westin, Columbia University, sponsored by Pacific Telesis Group. Westin Survey, Question 5 (inquiring if the person being polled had ever been extended the opportunity to opt-out of having their name and address given to other organizations, to

practices approves of carriers' use of CPNI in greater numbers than the general population and has a heightened interest in receiving information from their telecommunications carriers.[46]

A government mandate that conditions the right to speak truthful information in an educated manner on a listener's lack of interest is calculated to fail the narrow tailoring required by *Central Hudson* and the Tenth Circuit's analysis. As the Court concluded, it is not possible to correlate an individual's failure affirmatively to opt-in to a carrier's use of CPNI with a considered decision by that individual, because the failure to act is too strongly associated with inertia or a notion of disinterest.[47] The failure to act, then, provides little evidence of an individual's true intentions, and no dispositive or compelling demonstration of a "decision."

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which 41% said "yes"); Question 6 (inquiring whether the person being polled had ever exercised an "opt-out" invitation, to which 62% said they had).

[46] Westin Survey, Executive Summary at 8 ("almost two out of three members of the public -- 64% -- say [a carrier's use of account information] would be acceptable to them. When the 35% who said it was NOT acceptable were asked whether providing an opt out procedure would make this record-based communication process acceptable, 45% said it would. Combining those initially favorable with those becoming favorable if an opt out is provided produces a majority of 80% for this customer-record based . . . telephone company communication process"); Executive Summary at 9 ("among the groups that scored well above the public's 64% in their interest in receiving . . . information [from their carrier] were . . . Persons who have used an opt out," raising the interest rating to 74%).

[47] *Compare U S WEST v. FCC,* 182 F.3d at 1239 (results of U S WEST study do "not provide sufficient evidence that customers do not want carriers to use their CPNI. The results may simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally."). *See also* Letter from Elridge A. Stafford, Executive Director, U S WEST to Magalie Roman Salas, Secretary, Federal Communications Commission, dated Dec. 16, 1997, referencing a teleconference meeting with Commission staff and attaching materials used during the discussion. The materials emphasized that when customers were focused on telecommunications matters of immediacy to them, CPNI approvals were very high. The lack of engagement in other contexts was noted, as well as the fact that "[f]lat response across options and customer types and segments" was "[a]typical of marketing promotions and indicative of lack of engagement.").

The Commission's repeated observations in support of this behavioral phenomena,[48] make it impossible for the Commission to overcome this "common sense" regulatory observation (akin to "judicial notice") while at the same time defend an opt-in approval requirement as necessary for its "regulations . . . [to] meet its stated goals."[49] It is precisely because of this predictable consumer conduct that an opt-out process is best calculated to accurately assess an individual's true concerns about his or her personal privacy in a context that permits reasonable commercial transactions to continue unencumbered by overreaching governmental barriers to speech. The Constitution requires that the burden of overcoming inertia be placed, in most circumstances, on those who wish to restrict the dissemination of information, not on speakers or interested audiences.

4. Third-Party Disclosures

The Commission is not free simply to craft an opt-out CPNI approval regime for internal carrier use and sharing and impose an opt-in requirement for carrier disclosures of CPNI to unaffiliated third parties,[50] because not all CPNI disclosures to third parties would compromise even legitimate government interests in protecting an individual's privacy. Were the Commission to mandate an opt-in approval requirement for carriers to disclose CPNI to third

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[48] *See, e.g., In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd. 7571, 7610 n.155 (1991) ("*Computer III Remand Order*") ("Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction."); *Public Notice, Additional Comment Sought on Rules Governing Telephone Companies' Use of Customer Proprietary Network Information*, 9 FCC Rcd. 1685 (1994). *And see People of State of Cal. v. FCC*, 39 F.3d 919, 931, 933 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) ("If small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option").

[49] *U S WEST v. FCC*, 182 F.3d at 1239.

[50] The Tenth Circuit's opinion makes only occasional reference to third-party disclosures. *U S WEST v. FCC*, 182 F.3d at 1237-38.

parties, it would be required to successfully prove the elements required by *Central Hudson*, including those elements previously assumed by the Tenth Circuit in favor of the Commission. The Commission most likely could not overcome this evidentiary burden.

It is clear that not all sharing of CPNI with third parties is improper. Some disclosures are required by law.[51] Others are quite benign and commercially routine.[52] Such transfers

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[51] This information is required to be provided through Operations Support Systems ("OSS") in pre-ordering, ordering, provisiong, etc. contexts to competitive carriers. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15499, 15763-64, 15766-68 ¶¶ 518, 521-25 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *vacated in part on reh'g, as amended sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *further vacated in part sub nom. People of the State of Cal. v. FCC*, 124 F.3d 934 (8th Cir. 1997), *rev'd in part, aff'd in part and remanded sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999); *Second Order on Recon.*, 11 FCC Rcd. 19738 (1996); *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 3696, 3882-90 ¶¶ 421-37 (1999), *appeal pending sub nom. United States Telecom Ass'n v. FCC*, No. 00-1015 (D.C. Cir. pet. for rev. filed Jan. 19, 2000). *And see*, where the Commission has stated that a refusal to provide other carriers this information when they have less than written approval would most likely violate the Communications Act. *CPNI Order*, 13 FCC Rcd. 8125 ¶¶ 84-85 and n.315; *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 98.

*Compare* the Commission's determination that incumbent local exchange carriers are compelled by law to provide directory assistance information to third parties (47 U.S.C. § 251(b)) and cannot restrict the use of that information for the purpose for which it is provided. *In the Matter of Provision of Directory Listing Information Under the Telecommunications Act of 1934, As Amended*, 16 FCC Rcd. 2736, 2748-50 ¶¶ 28-29 (2001). *And see* Petition for Reconsideration, filed by Qwest Corporation, Mar. 23, 2001, CC Docket No. 99-273.

[52] For example, information might be shared with agents selling the services of a carrier, or when joint offerings are involved. Or, information might be shared when a portion of a business (or an entire business) is sold or transferred. Indeed, the Commission has acknowledged that such commercial circumstances are quite likely to occur in the telecommunications industry: "Given the dynamic marketplace, and the **likelihood** that carriers will continue to buy, sell, and transfer customer lines in the future," the Commission modified its slamming rules "to ensure that [its carrier change rules] do not inadvertently inhibit **routine business transactions**." *In the Matter of 2000 Biennial Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-129*, 16 FCC Rcd. 11218 ¶ 2 (emphasis added) ("*Bulk Transfer Order*"). These kinds of transactions might involve the

generally reflect situations where the transfer of the information is warranted based on the relationship between the transferor and the transferee and where arguments to restrict the information based on unsupported, overbroad assertions of "privacy interests" could well impede *bona fide* commercial and societal goals.[53]

Arguments may be made to the Commission that might support a finding that, in some circumstances, some carrier disclosures of CPNI to unaffiliated third parties might be privacy invasive. But no one has made any such particularized demonstration. And, even if some commentor comes forward with specific examples, such arguments would not provide sufficient foundation for the government to mandate an opt-in CPNI approval obligation with regard to all transfers of CPNI to any or all third parties. Situations involving idiosyncratic carrier "bad acts" can easily be regulated through the complaint process and other provisions of the Communications Act.[54] Even if market forces alone were inadequate to address this problem, the enforcement process provides an easily-identifiable, less intrusive governmental remedy to advance any legitimate privacy interests the Commission might be able to prove, as compared to a constitutionally questionable opt-in CPNI approval process.

## III. AN OPT-OUT CPNI APPROVAL MODEL IS IN THE PUBLIC INTEREST

Application of the rule of "constitutional doubt" requires that the Commission decline to reinstate an opt-in CPNI approval process. That result, moreover, is consistent with other provisions of the Act and sound public policy. The Commission should either allow carriers to

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"acquisition of assets (such as customer lines or accounts) or through a transfer of corporate control." *Id.* at n.3.

[53] *See U S WEST v. FCC,* 182 F.3d 1235 n.7 (noting potential societal costs that can be caused by restrictions on information flows in the name of privacy protection).

[54] Individuals can complain to the Commission either informally or formally or the Commission can proceed against a carrier for engaging in an unreasonable practice. 47 U.S.C. §§ 208, 209; 47 C.F.R. §§ 1.716, *et seq.*, 1.720, *et seq.*

devise their own CPNI approval processes, subject to market forces and regulatory enforcement actions; or the Commission must promulgate a narrowly-tailored CPNI approval rule that conforms with constitutional protections of speech.

A. Section 222 Requires No Governmental Implementation

Section 222 was "immediately effective" upon passage, as the Commission has noted.[55] That Section invites private party implementation, directing carriers -- all carriers -- to behave in certain ways with respect to CPNI, *i.e.*, "[e]xcept as required by law or with the approval of the customer, a telecommunications carrier . . . shall only use, disclose, or permit access" to CPNI according to certain requirements.[56] The word "approval" is clearly subject to a variety of meanings within a broad range of reasonable interpretations. It can include oral, written or electronic approvals. It can include opt-in or opt-out approvals. In "its strictest etymological construction," the word approve "is an after-the-fact ratification,"[57] of the sort inherent in implied approvals.[58]

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[55] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Notice of Proposed Rulemaking*, 11 FCC Rcd. 12513, 12514 ¶ 2 (1996). *And see In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards and Rules Governing Telephone Companies' Use of Customer Proprietary Network Information,* 11 FCC Rcd. 16617, 16619 ¶ 4 (1996).

[56] 47 U.S.C. § 222(c)(1).

[57] *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Company,* No. A 96-CA-397 SS, at 9-10 (W.D. Tex. 1996). Indeed, the Commission itself cited a dictionary definition of "approve" as meaning "ratify." *CPNI Order,* 13 FCC Rcd. at 70 ¶ 91 n.336.

[58] *See Griggs-Ryan v. Smith,* 904 F.2d 112, 116-17 (1st Cir. 1990) (noting that implied consent "inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights. . . [I]mplied consent is not constructive consent [but, rather] 'consent in fact' which is inferred 'from surrounding circumstances[']. . . [I]mplied consent -- or the absence of it -- may be deduced from 'the circumstances prevailing' in a given situation." (citations omitted)). In the *CPNI Order*, the Commission acknowledged that customer approval "can be *inferred* in the context of an existing customer-carrier relationship" in some circumstances. *CPNI Order*, 13 FCC Rcd. at 8080 ¶ 23 (emphasis in the

Allowing industry implementation of Section 222 unencumbered by formal Commission rules avoids government compulsion and the First Amendment implications such compulsion entails. It is, therefore, a CPNI approval model with much to be said for it.[59] This is particularly the case since such model would minimize burdens on single product carriers, in light of the fact that their subscribers only would be in one service category and approval would be presumed.[60] No further action would be required for this portion of the industry. Only carriers offering multiple products across Commission-defined service categories (local, wireless and long distance) would need to fashion a more formal approval process, including customer notifications.

A carrier notice outlining the types of CPNI transfers that might occur within the carrier's corporate enterprise and to unaffiliated third-parties,[61] coupled with the extension of reasonable customer choices in response to that notification, adequately protects customers' privacy interests. This type of full and fair disclosure, in conjunction with the fact that carriers who release CPNI haphazardly or without regard to the customer's legitimate privacy interests are

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original). Thus, the Commission agreed that "Congress recognized . . . that customers expect that carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service" (*id.* at 8102 ¶ 54). *Compare Clarification Order* (*Clarification Order*, CC Docket Nos. 96-115 and 96-149, FCC 01-247, rel. Sep. 7, 2001 included in the release of the *Second Further Notice*) ¶¶ 8-9 (where the Commission acknowledges that customer consent can be gleaned from a notice and opt-out regime).

[59] This is not a "self-regulation" regime, since carriers would be complying with legislative regulation buttressed by Commission reporting rules.

[60] *See* note 17, *supra*.

[61] "[E]ven if [a] customer does not currently subscribe to service from [the] affiliates" (*Second Further Notice* ¶ 26) or if a carrier makes no third-party disclosures, an opt-out notice can be crafted that makes clear that such activity might occur. It is also true, of course, that the affiliate might never use the information to market to the individual or that the CPNI may not prove particularly relevant in crafting a communication to the individual.

subject to market reactions as well as governmental enforcement, assures that individual consumers suffer no harms at the hands of unscrupulous carriers.[62]

Qwest's recommended approach is supported by the language of Section 222 itself. That section, unlike other Congressional consumer protection initiatives that expressly call for Commission rulemaking,[63] does not suggest, let alone compel, governmental participation in its implementation; nor does it "elaborate as to what form that approval should take."[64] Given that Section 222 applies to all carriers (a legislative extension of CPNI privacy protection beyond the prior Open Network Architecture ("ONA") BOC/GTE regulatory regime), Congress correctly did not prescribe a single approval mechanism. Wireline carriers, for example, might find one type of approval mechanism feasible, wireless carriers another.[65] Incumbent carriers with substantial numbers of customers might choose one approval mechanism, new entrants with limited customers might choose a different mechanism. There is nothing demonstrating that

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[62] *Compare* a similar process employed by the Federal Trade Commission ("FTC"). That agency has no substantive privacy rules directed to private industry. However, based on encouragement from that Commission, large numbers of businesses have established privacy policies. The FTC does not directly regulate the content of the policies, but it has declared its expectation that companies will truthfully say what they do with respect to privacy in those policies and do what they say. If a company does not, the FTC will proceed against them in an enforcement action, on the grounds that the "misrepresentation" by the business amounts to an "unfair" or "deceptive" trade practice, which the FTC can address through its existing legislatively-delegated authority.

[63] *Compare* 47 U.S.C. § 227(c) ("[w]ithin 120 days after [the date of enactment of this section], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object"), Section 258 (certain actions are to take place "in accordance with such procedures as the Commission may prescribe"). *Compare* a predecessor bill to Section 222, H.R. 1555 (104th Congress, First Session, 1995) that would have required a rulemaking on privacy matters over and above the general language similar to Section 222(c)(1) regarding customer approvals.

[64] *U S WEST v. FCC*, 182 F.3d at 1230.

[65] Other than with respect to wireless location information (*see* note 14, *supra*), wireless carriers are not required to treat CPNI differently than other carriers.

Congress applauded one type of approval mechanism[66] and frowned on another. The Commission should approach the approval process with the same liberality and flexibility.

B. Any Commission Rules Must Be Narrowly-Tailored

Should the Commission persist in promulgating CPNI approval rules, any such rules -- impacting as they do lawful speech -- must be narrowly tailored. In light of the fact that carriers have choices among a wide variety of approval mechanisms, a Commission rule requiring carriers to advise the Commission of the approval mechanism chosen would not be inappropriate. And, in those situations where a notification was a necessary aspect of the approval process, the Commission could require carriers to provide it with information about the notification process, perhaps even requiring submissions of scripts used or notifications sent.[67]

The Commission must be careful to avoid unwarranted mandates for affirmative customer approvals for CPNI use and disclosure. A narrowly-tailored government-mandated CPNI approval mechanism is one that places the burden to act on those individuals who might be keenly interested in the matter of privacy generally, and the issue of privacy within the carrier-customer relationship specifically. Only if an individual affirmatively "opts-out" can the "true" meaning of the individual's intentions with respect to privacy "protection" be understood unambiguously.[68]

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[66] With the exception of wireless location information. *See* note 14, *supra*.

[67] *Compare Bulk Transfer Order*, 16 FCC Rcd. at 11218 ¶¶ 12-13.

[68] Indeed, this is why the Commission chose the "per-call blocking" mechanism in the Caller ID proceeding as reflecting the best balance of privacy interests as between the called and calling party. Per-call blocking required the calling party to reflect on whether the identifying information should flow or be blocked in a specific situation. Unless the individual consciously chose to block information, the information passed unimpeded, allowing the called party to better manage his or her own privacy interests and accommodating the "promot[ion] [of] technological innovation and new applications that will foster economic efficiency and provide new employment, manufacturing and investment opportunities." *In the Matter of Rules and*

The type of regulation described here is simple and easy to administer. It would provide the Commission with basic information about carrier practices such that, should the Commission disagree with those practices, it can institute enforcement proceedings to protect specific consumers against specific carrier-initiated harms. Such limited rules -- without "devilish details" and improper burdens -- are the most calculated to withstand constitutional challenge.

C. Foregoing An Opt-In Mandate Is Consistent With Sound Policy

The 1996 Act, which included the CPNI provisions that became codified in Section 222, was intended to implement a pro-competitive, "deregulatory" era in telecommunications.[69] A process that requires carriers to solicit, and customers to provide, affirmative evidence of their consent to the receipt of information epitomizes the kind of burdensome regulation the Commission has, at least in other contexts, been attempting to eliminate.[70]

Construing Section 222 not to mandate an opt-in process for communications that use CPNI not only reflects solid First Amendment jurisprudence, but also is the most "deregulatory" approach available to the CPNI inquiry. In addition, the matter of CPNI approvals and carriers' use and disclosure of this information has now been pending for several years, damming

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*Policies Regarding Calling Number Identification Service, Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd. 1764, 1766 ¶ 8 (1994).

[69] *U S WEST v. FCC*, 182 F.3d at 1236-37 and n.9.

[70] The Commission has been engaged in a number of proceedings established to meet Congress' expectations in adopting 47 U.S.C. § 161 (Section 11 proceedings). That section has two subdivisions. The first requires a comprehensive review of Commission regulations every two years to aid the Commission in determining "whether any . . . regulation[ ] [is] no longer necessary in the public interest as the result of meaningful competition between providers of such service." 47 U.S.C. § 161(a). Regulations failing to meet this standard (*i.e.*, the "Effect of [the Commission] Determination") shall be repealed or modified. *Id.* at § 161(b). This mandated statutory regulatory reform regime changes, to a large extent, traditional notions of rulemaking proceedings. As Commissioner Furchgott-Roth accurately stated during his tenure, if the Commission cannot demonstrate that a rule is actually necessary then, according to subsection (b) of the statute, it must be repealed or modified. *See* Commissioner Furchtgott-Roth

information flows and creating uncertainty among carriers and customers. Rolling the appellate dice based on the unlikely possibility that the Tenth Circuit can be convinced to sustain an opt-in process will, at best, perpetuate that uncertainty. In sum, rejection of an opt-in CPNI approval process is mandated by the First Amendment, would further the Commission's deregulatory objectives, and end uncertainty in this area.

## IV. THE COMMISSION IS NOT FREE TO LIMIT THE USE OF CPNI BETWEEN THE BOC AND A SECTION 272 AFFILIATE

As discussed above, the Tenth Circuit's decision addressed speech within a common corporate enterprise.[71] Speech within such enterprise is protected speech, all the more so in the context of speech by a BOC concerning long distance services since (a) like carriers' wireless

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Issues Comprehensive Report on FCC's Biennial Review Process, 1998 FCC LEXIS 6409, Dec. 21, 1998 at 8.

[71] *See U S WEST v. FCC*, 182 F.3d at 1230 and n.2 (observing that the Commission's "regulations treat affiliated entities of a carrier as separate for the purposes of use or disclosure. Thus, the regulations permit unapproved disclosure of CPNI between affiliated entities of a telecommunications carrier only when the carrier provides different categories of service and the customer subscribes to more than one category of service."); 1233 n.4 (where the Court stated that "the [intra-carrier] speech is properly categorized as commercial speech").

*See also* Brief for Petitioner and Intervenors at 20-21 (referencing two different corporations and service categories in two different examples, *i.e.*, "Under the FCC's so-called 'total service approach,' a carrier providing only local service to a particular customer would not be able to use CPNI, without prior affirmative customer consent, to speak to the customer regarding cellular or long distance service. A carrier providing only long-distance service would be similarly constrained with respect to local or wireless services not currently provided to its customer.") (footnote omitted), 26 ("In addition to the barrier the *CPNI Order* imposes on carrier-customer communications, it also restricts the right of common corporate affiliates and divisions, and of personnel within the same carrier, to share CPNI . . . By preventing carriers' separate divisions or affiliates from communicating CPNI to each other, even where Congress has explicitly granted the right for those divisions or affiliates to engage in joint marketing, the *CPNI Order* operates as a classic restriction on speech."); Reply Brief for Petitioner and Intervenors at 4 (arguing with respect to "Intra-Carrier Speech" -- "CPNI-related communications within a telecommunications carrier, and within the carrier's corporate family[,]" and providing an additional example of communications between two different corporations involving two different service categories).

services, Congress has expressly permitted joint marketing,[72] and (b) Congress has affirmatively acted to eliminate any nondiscrimination obligations with respect to such joint marketing of a Section 272 affiliate's long distance services.[73]

Any future attempt to circumscribe speech within a corporate family would have to be defended under a *Central Hudson* test. For that reason, it is unlikely that the Tenth Circuit's determination that CPNI use and communication is constitutionally protected would change. Nor would the Court's determination that burdening the speech of the BOC and its affiliate, and the speech of these companies with customers, is constitutionally impermissible.

A. Interplay Between Sections 222 And 272

Both before and since the issuance of the Tenth Circuit opinion, the Commission has interpreted the interplay between Sections 222 and 272. A change in interpretation at this point would be not only arbitrary and capricious but constitutionally infirm. Like courts faced with serious constitutional problems, that are required to construe statutes to avoid such problems,[74] if possible the Commission must construe legislative pronouncements in a manner that avoids constitutional consequences.[75] A reconciliation of the statutory provisions, such that Section 222 controls all affiliate sharing of CPNI (whether BOC or not) once necessary customer approvals

[72] *See* 47 U.S.C. § 152 note (Section 601(d) of the Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, 110 Stat. 56, 114 (Feb. 8, 1996)) (wireless) and § 272(g)(3) (interexchange long distance). *And see AT&T Corp. v. FCC,* note 13, *supra,* 220 F.3d at 632.

[73] 47 U.S.C. § 272(g)(3).

[74] *U S WEST v. FCC,* 182 F.3d at 1231.

[75] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See also In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order and Further Notice of Proposed Rulemaking,* 12 FCC Rcd. 5361, 5376 ¶ 37 (1997); *Second Report and Order*, 12 FCC Rcd. 3824, 3834 ¶ 24 (1997) (both

are secured, is the best legal and policy resolution. The Commission is not in a position to change course.

After having preliminarily concluded that Section 272 took some kind of precedence over Section 222 with respect to CPNI,[76] in its *CPNI Order* the Commission "revisit[ed] and overrule[d]" that position.[77] In language that could not be clearer, the Commission provided its rationale and justification for its change of position:

- We agree with the BOCs that the specific balance between privacy and competitive concerns struck in section 222, regarding all carriers' use and disclosure of CPNI, sufficiently protects those concerns in relation to the BOCs' sharing of CPNI with their statutory affiliates.[78]

- Although we find that section 222 envisions a sharing of customer CPNI among those related entities . . . , such a sharing among BOC affiliates would be severely constrainted or even negated by the application of the section 272 nondiscrimination requirements.[79]

- [A]pplying section 272 to the BOCs sharing of CPNI with their statutory affiliates would not permit the goals and principles of section 222 to be realized fully as we believe Congress contemplated.[80]

- [W]e conclude that the most reasonable interpretation of sections 222 and 272 is that section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates.[81]

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*Orders* citing to *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464, 467, 469 (1994)(513 U.S. 64, 68-69, 72-74)).

[76] *See In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, First Report and Order and Further Notice of Proposed Rulemaking,* 11 FCC Rcd. 21905, 22010 ¶ 222 (1996) ("*Non-Accounting Safeguards Order*").

[77] *CPNI Order*, 13 FCC Rcd. at 8172 ¶ 154, 8179 ¶ 169.

[78] *Id.* at 8172 ¶ 154.

[79] *Id.* at 8174 ¶ 158.

[80] *Id.* at 8179 ¶ 168.

[81] *Id.* at 8179 ¶ 169.

Later, after the Tenth Circuit's opinion was issued, the Commission confirmed its position that Section 222 controlled the matter of CPNI use and sharing with respect to the BOC and its affiliate, not Section 272. The Commission stated:

- We affirm our conclusion in the *CPNI Order* that the **most reasonable** interpretation of the interplay of sections 222 and 272 is that section 272 does not impose any additional obligations on the BOCs when they share CPNI with their section 272 affiliates.[82]

- We affirm the *CPNI Order*'s conclusion that the term "information" in section 272(c)(1) does not include CPNI.[83]

- While the legislative history is silent about the meaning of "information" in section 272(c)(1), . . . **we believe that the structure of the Act** belies petitioners' contention that the term "information" has a plain meaning that encompasses CPNI. In enacting section 222, Congress carved out very specific restrictions governing consumer privacy in CPNI and consolidated those restrictions in a single, comprehensive provision. We believe that the specific requirements governing CPNI use are contained in that section and we disfavor, accordingly, an interpretation of section 272 that would create constraints for CPNI beyond those embodied in the specific provision delineating with those constraints. As a practical matter, the interpretation proffered by petitioners would bar BOCs from sharing CPNI with their affiliates . . . [W]e find it a more **reasonable interpretation** of the statute to conclude that section 222 contemplates a sharing of CPNI among all affiliates (whether BOCs or others), consistent with customer expectations that related entities will share information so as to offer services best tailored to customers' needs.[84]

Finally, almost a year after the Tenth Circuit's decision was handed down, the Commission reiterated and endorsed its prior statutory interpretations. Rejecting an AT&T challenge to Bell Atlantic's use of CPNI subsequent to the time Bell Atlantic had been authorized to provide interexchange long distance, the Commission stated:

> [T]he Commission's construction of section 222 as expressing pro-competitive concerns was only one of the several reasons why the Commission construed section 272(c)'s reference to "information" not to include CPNI. The Commission also so concluded in order to "further the principles of customer convenience and control," and "protect

[82] *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 137 (emphasis added).

[83] *Id.* ¶ 141.

[84] *Id.* ¶ 142 (emphasis added).

customer's privacy interests." Moreover the Commission was concerned that a reading of section 272 such as advocated by AT&T here [requiring nondiscriminatory treatment of CPNI] would lead the BOCs to "simply choose not to disclose their local service CPNI," which would "not serve the various customer interests envisioned under section 222." . . . Accordingly, because we conclude that section 272(c)'s reference to "information" does not include CPNI, we deny AT&T's . . . claim.[85]

The above interpretations that Section 222 controls the use and sharing of CPNI and that Section 272 does not are clearly the correct ones. Not only does such reconciliation avoid agency action that would pose serious constitutional problems, the reconciliation accommodates the rule of statutory construction that within a piece of integrated legislation, the more specific statutory provisions control over the more general.[86] The more specific CPNI provision, Section 222, *should control* the CPNI customer approval process with respect to both the BOC and the Section 272 affiliate, as well as how CPNI is used or shared after such approval has been secured.

B. Joint Marketing Exception Allows CPNI Sharing

Even if Section 272(c)(1) had some statutory relevance to CPNI usage and sharing between a BOC and its Section 272 affiliate, Congress' determination that "joint marketing and sale of services permitted under [272(g)(3)] shall not be considered to violate the nondiscrimination provisions" of (c)(1) would wrest CPNI "information" from the hard grasp of Section 272(c)(1)'s nondiscrimination obligation regarding the sharing of "information." Prior

[85] *AT&T/Bell Atlantic Complaint,* note 12, *supra*, 15 FCC Rcd. at 20004-05 ¶¶ 18-19.

[86] *In re Applications of Ameritech Corp. and SBC Communications, Inc., [For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd. 14712, 14940 n.1047 (citing to *HCSC-Laundry v. United States*, 450 U.S. 1, 6 ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned") (1981); *In the Matter of the Federal-State Joint Board on Universal Service, Report to Congress,* 13 FCC Rcd. 11501, 11646 (1998) ("typical statutory construction requires that specific directions in a statute trump any general admonitions").

Commission observations and adjudications clearly demonstrate the connection between CPNI and joint marketing, as well as the adverse impact to joint marketing when CPNI is not available.[87] Quite simply, CPNI is often the predicate or foundation for marketing,[88] including joint marketing.

Other considerations associated with carrier marketing also support allowing CPNI use for joint marketing of the BOC and its Section 272 affiliate. As the record shows, the two major national interexchange carriers have touted the depth and breadth of their customer information.[89] These carriers clearly have substantial information on customers across the nation with respect to actual (as well as predicted) interexchange calling. The BOCs should have a similar benefit with respect to what local service CPNI might be able to predict (if anything) with respect to the joint marketing of local and long distance services. There is no real discrimination in such allowance, since both the BOCs and interexchange carriers are in predictive modes with respect to one customer constituency (either local or long distance). Only in this way can the Commission realize its (and Congress') expectation that, upon securing Section 271 relief, a "BOC [should]

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[87] *See, e.g.*, Brief for Petitioner and Intervenors at 5-8 and nn.6-7, 10-11 (citing to proceedings in which the Commission has found CPNI necessary or useful in joint marketing and one-stop shopping.

[88] *U S WEST v. FCC,* 182 F.3d at 1233 n.4 ("when the sole purpose of intra-carrier speech based on CPNI is to facilitate the marketing of telecommunications services to individual customers . . . the speech [is] integral to and inseparable from the ultimate commercial solicitation.").

[89] Letter from Elridge A. Stafford, Executive Director, U S WEST to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, Jan. 27, 1998, Attachment at 10 ("AT&T boasts: 'We now have a database with information about nearly 75 million customers. We know their wants, needs, buying patterns, and preferences;'" "MCI claims databases that contain more than 300 million sales leads and up to 3,500 fields of information about 140 million customers and prospects[.]" *See also* Letter from Kathryn Marie Krause, Senior Attorney, U S WEST to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, Nov. 14, 1997, at 12 n.39 (providing references to where AT&T and MCI touted their substantial and "rich" consumer data).

be permitted to engage in the same type of marketing activities as other service providers."[90] Thus, should the Commission determine that Section 272(c)(1) has any relevance to CPNI, it must simultaneously find that the CPNI "information" can be used without regard to the nondiscriminatory requirements of that Section, in light of the exemption in Section 272(g)(3) permitting its use in joint marketing.

## V. CONCLUSION

The Tenth Circuit's decision makes clear that the Commission's discretion with respect to the promulgation of CPNI approval rules is subject to significant Constitutional constraints. The Commission's actions must respect both the speech rights of carriers as well as their customer audiences. Government mandates with respect to CPNI approvals can survive future appellate challenge only if the government successfully articulates and defends a legitimate governmental interest, demonstrates that the means it chooses to advance that legitimate interest does so in a direct and material way, and successfully proves that the means chosen to advance the government interest are narrowly-tailored to achieve the government's objective. The Commission should not underestimate the evidentiary burden imposed on it, since few government regulations burdening speech have been upheld under the *Central Hudson* test.

The Commission, in no event, should attempt to burden the speech of BOCs *vis a vis* their Section 272 affiliates. Such action would be contrary to the Tenth Circuit's analysis and First Amendment principles. In addition to raising First Amendment implications similar to those that caused the Tenth Circuit to invalidate the Commission's CPNI opt-in regulations, replacing "opt-in" regulations with additional CPNI burdens or restrictions on BOCs would be at

[90] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 22046 ¶ 291. *And see CPNI Order*, 13 FCC Rcd. at 8178 n.580 (noting symmetry between marketing provisions for interexchange carriers and BOCs).

odds with the Commission's prior statutory interpretations of the interplay between Sections 222 and 272. Those interpretations, as conceded by the Commission, were invited and endorsed by the structure of the Telecommunications Act itself. Moreover, burdening communications between a BOC and its Section 272 affiliate would frustrate Congress' express endorsement of BOC joint marketing found in Section 272(g)(3). Nothing about the Tenth Circuit's opinion requires a revisitation of this matter and the Commission should decline to undertake such action.

The Commission can avoid continued and unsettling controversy over the proper format and scope of CPNI approvals by deferring to the Congressional directive of Section 222. The language of that Section runs directly to carriers, imposing restrictions on carrier conduct (*e.g.*, that CPNI be used only in certain ways) and anticipating actions that would warrant carrier use of CPNI beyond those restrictions (*e.g.*, legal requirements or customer approvals). A CPNI approval model which imposes directly on carriers the responsibility for compliance with Section 222, yet promotes that compliance through Commission enforcement actions in those instances of carrier misfeasance, represents a fundamentally sound CPNI approval model. It benefits from simplicity, ease of administration, and the avoidance of government compulsion.

Should the Commission determine that reliance on market forces and regulatory enforcement capabilities is insufficient for proper administration of Section 222 and that more formal regulations are required, those regulations must conform to constitutional imperatives. The rules must be narrowly-tailored and avoid unduly burdening speakers of truthful information and interested audiences. The CPNI approval mechanism most calculated to withstand constitutional scrutiny as applied to multi-product carriers wishing to use CPNI across service categories in those cases where their customers do not subscribe to service in each category, is an

opt-out approval model. Carriers might be asked to provide the Commission with written information regarding the CPNI approval method chosen and the notification information provided customers. Such a limited CPNI approval rule might well accommodate sound First Amendment principles.

Qwest urges the Commission to adopt the proposals and recommendations contained in these comments. The approach outlined herein fairly balances governmental, privacy and commercial interests in a manner consistent with the constitution and sound public policy. No one could expect more.

Respectfully submitted,

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November 1, 2001

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FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| Telecommunications Carriers' Use | ) | |
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# REPLY COMMENTS OF QWEST SERVICES CORPORATION

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## REPLY COMMENTS OF QWEST SERVICES CORPORATION

Pursuant to the Federal Communications Commission's ("Commission" or "FCC") request for comment with respect to its *Second Further Notice of Proposed Rulemaking* ("*Second Further Notice*")[2] in the above-captioned proceedings, Qwest Services Corporation ("Qwest") respectfully submits these Reply Comments.

## I. INTRODUCTION AND SUMMARY

As Qwest demonstrated in its opening Comments, the Tenth Circuit's action in *U S WEST v. FCC*[3] significantly limits the Commission's discretion in promulgating Customer

[1] The *Second Further Notice* states that parties should make filings in this proceeding in CC Docket 99-273 (*see Second Further Notice* ¶ 32), despite the fact that the caption of the proceeding does not reference such docket. Qwest assumes this is simply a typographical error.

[2] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket Nos. 96-115 and 96-149, *Second Further Notice of Proposed Rulemaking,* FCC 01-247, rel. Sep. 7, 2001.

[3] *U S WEST, Inc. v. FCC,* 182 F.3d 1224, 1240 (10th Cir. 1999), *cert. denied,* 120 S.Ct. 2215 (June 5, 2000) (*"U S WEST v. FCC"*).

Proprietary Network Information ("CPNI") approval processes and imposes material constitutional restraints on the Commission's revisitation of its *CPNI Order*.[4] When tested against those constraints, only a governmentally-mandated opt-out CPNI approval process can be sustained. Such process is also the most consistent with the deregulatory goals of the Act and Commission policy.

The overwhelming majority of commenting parties agree with Qwest's position. Those commentors argue, correctly, that carriers should have primary responsibility for establishing and implementing CPNI approval processes,[5] guided by market forces,[6] with government enforcement mechanisms available as an additional safeguard.[7] Alternatively, if the Commission is nevertheless inclined to adopt specific regulations governing CPNI approvals, commentors argue that only an opt-out CPNI approval process accommodates constitutional considerations, customer privacy interests and legitimate commerce.[8] The Commission should align its

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[4] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking,* 13 FCC Rcd. 8061 (1998) ("*CPNI Order*").

[5] ALLTEL Communications, Inc. ("ALLTEL") at 2; Cingular Wireless LLC ("Cingular") at 2-3; Cellular Telecommunications & Internet Association ("CTIA") at 5-6; Sprint Corporation ("Sprint") at 2, 4-5, 6-7 all noted that no formal Commission rules are required with respect to the CPNI approval process. CTIA noted that the Commission could simulate the self-regulatory privacy approach adopted by the Federal Trade Commission ("FTC"), an approach extolled by the current Chairman of the Commission. CTIA at 6-10. *And see* Qwest at 18-19 n.62.

[6] AT&T Wireless Services Inc. ("AWS") at 2; Cingular at 2-3; United States Telecom Association ("USTA") at 13.

[7] Sprint at 6; CTIA at 12; USTA at 13. Individuals can complain to the Commission either informally or formally or the Commission can proceed against a carrier for engaging in an unreasonable practice. 47 U.S.C. §§ 208, 209; 47 C.F.R. §§ 1.716, *et seq.*, 1.720, *et seq.*

[8] *See* ALLTEL at 4; AT&T Corp. ("AT&T") at 3-9; AWS at 2, 6, 8-9, 10; BellSouth Corporation ("BellSouth") at 4-5; CenturyTel, Inc. ("CenturyTel") at 3-4, 8-10; Direct Marketing Association ("DMA") at 3; Nextel Communications, Inc. ("Nextel") at 2; National Telephone Cooperative Association ("NTCA") at 2, 4; SBC Communications Inc. ("SBC") at 2, 8-13; Sprint at 6-7;

regulatory action with this advocacy, since it is the only course of action calculated to be sustained as constitutionally permissible.

Only two commentors -- the Electronic Privacy Information Center, *et al.*, ("EPIC") and Mpower Communications Corp. ("Mpower") -- argue for an opt-in approval requirement for all (EPIC ) or some (Mpower) CPNI. Neither supports its position with relevant legal precedent or empirical evidence. Rather, each purports to support its argument with conjecture and analogies to inappropriate facts or situations. These comments fail to provide the evidentiary support necessary to justify an opt-in CPNI approval mechanism under the requirements of *Central Hudson*[9] and the Tenth Circuit's analysis.

EPIC, somewhat reconstituted from the *Amici Curiae* group of parties that filed an unsuccessful petition for reconsideration before the Tenth Circuit,[10] presses arguments similar to those raised earlier and rejected by that Court. Accordingly, any decision that relies upon these unsubstantiated arguments will be rejected -- again -- on appeal.

EPIC here tries to revive its case that an opt-out CPNI approval requirement fails to protect some general government interest in privacy. EPIC fails to supply any of the evidence or

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Vartec Telecom, Inc. ("Vartec") at 2; Verizon Telephone Companies ("Verizon") at 2-3; Verizon Wireless at 1, 4-5, 12-15; USTA at 3; WorldCom, Inc. ("WorldCom") at 1-2.

[9] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) ("*Central Hudson*"). As outlined by the Tenth Circuit, "the government may restrict the speech only if it proves: '(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.'" *U S WEST v. FCC,* 182 F.3d at 1233 (referencing *Central Hudson*, 447 U.S. at 564-65).

[10] In this filing, EPIC professes to represent "15 consumer and privacy organizations." EPIC at 6. Significantly, this commenting body no longer enjoys the support of the "22 Law Professors and Privacy Scholars" who were represented by its predecessor's filing. *See* Motion of the Electronic Privacy Information Center, *et al.*, filed Oct. 22, 1999, Case No. 98-9518 (10th Cir.) and Brief of the Electronic Privacy Information Center, *et al.*, filed Oct. 22, 1999 in the same case.

analysis that was missing from its predecessor's prior claims, and from the Commission's original *CPNI Order*. Specifically, EPIC fails to explain the specific nature and importance of the governmental interest in protecting consumer privacy with respect to CPNI. EPIC fails to provide any relevant facts or data to show how an opt-out CPNI approval mechanism would compromise any legitimate governmental interest associated with a carrier-customer relationship or the interests of the parties to the telecommunications service relationship. Indeed, EPIC provides only the most superficial legal analysis on the subject of informational privacy, citing to cases where the facts and the law are inapposite to the current situation. All told, EPIC's advocacy that the Commission re-impose an opt-in CPNI approval mechanism as a matter of federal mandate essentially invites the Commission to abrogate the law and constitutional protections afforded speakers and audiences under the First Amendment. The Commission should decline the invitation.

So too must the Commission decline the invitation of Mpower to parse CPNI into different information sub-elements and require opt-in approval before CPNI **usage** information can be used by a carrier, shared with an affiliate, or disclosed to a third party. Mpower's purported "proof" is deficient to sustain its advocacy, based as it is solely on its opinion and a misplaced comparison between information practices, policies and protections between the United States and the European Union. Mpower provides no empirical evidence that customer expectations generally would require such differentiation and offers no legal analysis regarding how such a bifurcated approach to a CPNI approval process would pass constitutional scrutiny.

Finally, four commentors urge the Commission to deviate from its repeated finding that Section 222 -- not Section 272 -- controls the use and sharing of CPNI by a BOC and its Section 272 Affiliate. Those commentors disagree with the Commission's findings for reasons that have

nothing to do with the Tenth Circuit's disapproval of the mandatory opt-in process. Those commentors argue, variously, that the Commission's current position is wrong and has been wrong since its adoption; that affirmative consent to share CPNI with a Section 272 Affiliate must be secured by a Bell Operating Company ("BOC") before that sharing takes place; or that nonaffiliated carriers should be added beneficiaries of any notice and opt-out approvals secured by a BOC for CPNI usage within its corporate enterprise. That is, they argue that if BOCs use opt-out approval mechanisms to support CPNI sharing with their Section 272 Affiliates, the BOCS should be required to provide "notice" that other carriers may access the BOC's customers' CPNI unless the BOC's customers "opt-out" of such third-party disclosures. As AT&T puts it, its an all or nothing approach for the consumer.[11]

The arguments of these parties have nothing do with the protection of customer privacy or the public interest, and cannot justify interference with protected speech. In this regard, apart from the fact that the commentors have failed to articulate any basis for the Commission to change its position on the interplay between Sections 222 and 272, none of them address the lawfulness under the First Amendment of a requirement that conditions a BOC's right to speak to its affiliate on its provision of CPNI to others. The Tenth Circuit's clear determination that intra-corporate speech -- including speech by local exchange companies with wireless and long distance affiliates -- is constitutionally protected speech,[12] and the Commission's obligations to

[11] AT&T at 15 n.10.

[12] *U S WEST v. FCC,* 182 F.3d at 1230 (observing that the Commission's "regulations treat affiliated entities of a carrier as separate for the purposes of use or disclosure. Thus, the regulations permit unapproved disclosure of CPNI between affiliated entities of a telecommunications carrier only when the carrier provides different categories of service and the customer subscribes to more than one category of service;" in this discussion the Court references both wireless and long distance services); 1233 n.4 (where the Court stated that "the [intra-carrier] speech is properly categorized as commercial speech").

construe statutes in a manner that avoids constitutional conflicts,[13] underscores the absence of any basis for the Commission to reverse its prior rulings on the interplay of Sections 222 and 272.

## II. OPT-IN CPNI APPROVAL PROCESSES WILL NOT WITHSTAND CONSTITUTIONAL SCRUTINY AND SHOULD NO LONGER BE PURSUED

### A. EPIC Fails To Offer Any Serious Legal Or Empirical Evidence To Support An Opt-In Process

EPIC's advocacy fails because it ignores the directive of the Tenth Circuit that "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered proper balancing of the benefits and harms of privacy."[14] Contrary to the Court's clear directive, EPIC fails to identify any specific privacy harm associated with the use of CPNI within the carrier-customer relationship, or even within the context of reasonable third-party releases. And, EPIC makes no attempt to balance any "privacy harms" against the burden imposed on speakers and interested audiences, not to mention legitimate commercial activity (*e.g.*, efficiency, productivity, financial stability).[15]

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[13] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See also In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 5361, 5376 ¶ 37 (1997); *Second Report and Order*, 12 FCC Rcd. 3824, 3834 ¶ 24 (1997) (both *Orders* citing to *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464, 467, 469 (1994)(513 U.S. 64, 68-69, 72-74)).

[14] *U S WEST v. FCC*, 182 F.3d at 1234-35 (footnote omitted).

[15] *Compare id.* at n. 7 ("privacy interferes with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently

1. EPIC's Legal Citations are not Relevant or Controlling

EPIC attempts to fashion its putative government interest as one imbued with constitutional significance,[16] despite the Tenth Circuit's conclusion that the matter of CPNI use and sharing does not itself implicate a federal constitutional right to privacy since there is no claim that the government is violating any person's privacy.[17] At this time in American jurisprudence, there is no constitutional right to "informational privacy" as between private parties. There may be statutory rights, or common law rights, but there is no constitutional government obligation (or right) to protect private parties within a relationship from each other or to regulate the way in which information generated within that relationship is used.

The cases EPIC cites fail to support its position. Specifically, the cases do not involve parties within relationships using information within that relationship to advance the informational and pecuniary interests of both parties. Rather, some cited cases involve holders of information who are met with demands from unaffiliated entities to release the information when the holder of the information has no interest in doing so, *e.g., Lanphere & Urbaniak v. Colorado*[18] and *Department of Defense v. Federal Relations Auth.*[19] These cases do not address

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marketing their products or services. In this sense, privacy may lead to reduced productivity and higher prices for those products or services").

[16] EPIC at 3 ("The constitutional right of privacy protects two distinct interests: 'one is the individual interest in avoiding disclosure of personal matters, and the other is the interest in independence in making certain kinds of important decisions,'" referencing *Whalen v. Roe,* 429 U.S. 589 (1997)).

[17] *U S WEST v. FCC,* 182 F.3d at 1234 n.6 ("Here, the question is solely whether privacy can constitute a substantial state interest under *Central Hudson*, not whether the FCC regulations impinge upon an individual's right to privacy under the Constitution."). *Compare Whalen v. Roe, see* note 16, *supra*, articulating the elements of a constitutional claim. *And compare Sheets v. Salt Lake County,* 45 F.3d 1383 (10th Cir. 1995) (cited by EPIC at 3 n.9), which also involved a claim against the state under 42 U.S.C. § 1983.

[18] 21 F.3d 1508 (10th Cir. 1994), cited in *U S WEST v. FCC, id.* at 1235 (supporting the Court's decision to assume a substantial government interest).

the rights of a willing carrier/speaker or an interested customer/audience or the matter of information generated within a relationship being used within that relationship. Failing even to address the facts of the instant case, these cases clearly do not support imposing a high barrier (*i.e.*, opt-in approval) to speech within the context of the existing relationship.

The case of *Edenfield v. Fane*,[20] while containing the language quoted favorably by EPIC,[21] resulted in judicial action at odds with EPIC's advocacy. In *Edenfield*, the Court invalidated a ban on in-person solicitation by certified public accountants, even though other communication vehicles (*e.g.*, mailings or advertisements) existed and remained permissible. The case supports more the position of Qwest and commentors supporting opt-out CPNI approval mechanisms than a party urging an opt-in model.

Likewise meritless is EPIC's attempt to bolster its position by citing a publication written by two academicians regarding informational privacy practices and policies in the United States as compared to the European Union.[22] The relevance of that work to the current CPNI approval debate is oblique at best.[23] While EPIC's reference might be instructive for policymakers within a legislative or diplomatic venue, the commentary bears little materiality on the question of the

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[19] 510 U.S. 487 (1994), cited by EPIC at 4 n.11. While the case does contain dicta about information and an individual's expectation of privacy, it was within a context of information being legally wrested from a holder not desiring to release it. That is certainly not the case here.

[20] 507 U.S. 761 (1993).

[21] EPIC at 3 n.9.

[22] *Id.* at 5 and n.23. *See* note 51, *infra* discussing the dubious relevance of the question "whether the United States has adequate privacy protection to support transborder data flows from the European Union" to this case. The referenced law review article was authored in that context.

[23] It is precisely because the subject of "privacy" can encompass so many different types of interests and considerations that the Tenth Circuit cautioned that governmental "interests" in privacy cannot be abstract or broad or ill-defined when the government claims to be protecting those interests. Rather, the interests -- and the harms anticipated if the interests are not protected -- must be specific and explicit. *See U S WEST v. FCC,* 182 F.3d at 1234-35.

lawfulness of a governmentally-mandated opt-in CPNI approval process. The latter question involves not an analysis of nations characterized by different information use philosophies and policies as between disparate world economies but the use of specific information by entities within an existing business relationship.

EPIC also argues that "Congress recognized the importance of a citizen's privacy interest by enacting other statutes preventing disclosure of precisely the same information [as CPNI] to the public at large."[24] This assertion is incorrect on at least three counts. First, the information associated with EPIC's cited legislative enactments does not involve information "precisely" like CPNI. While cable viewing records and video rental records might be similar in sensitivity to CPNI to some persons, other information -- such as credit (financial) and medical information -- is generally considered more sensitive than CPNI, as witnessed by representations of other administrative agencies and expert opinions.[25] Second, EPIC's citation to the Cable Act and Video Privacy Act as supportive of its position is misplaced. The Cable Act allows internal use of customer information for purposes of providing cable and cable-like services;[26] and the Video

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[24] EPIC at 4.

[25] Numerous parties argue that CPNI does not rise to the level of "sensitive" information in the way that financial or health information does. *See, e.g.*, ALLTEL at 4-6; AWS at 4; Cingular at 4-6; DMA at 4-6; Nextel at 2, 6-8; Sprint at 6 and n.1; Vartec at 3. *And see* U.S. Department of Commerce, National Telecommunication and Information Administration, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information," (October, 1995), at 25 n.98; Letter from Gina Harrison, Director, Pacific Telesis, to William F. Caton, Acting Secretary, Federal Communications Commission, dated Jan. 24, 1997, transmitting a letter from Privacy & Legislative Associates, Alan Westin and Bob Belair, to A. Richard Metzger, Jr., Deputy Chief, Common Carrier Bureau, Federal Communications Commission, dated Jan. 23, 1997, at 2-8 ("Westin Jan., 1997 Letter").

[26] 47 U.S.C. § 551. *And see* BellSouth at 6-7; DMA at 3-4; Verizon at 3 (arguing that the Cable Act presents an appropriate opt-out model for the Commission to consider). *See also* U S WEST, Inc.'s Opening Comments, CC Docket No. 96-115, filed June 11, 1996 at 7-10 ("1996 U S WEST Comments") (presenting a "schematic of the salient provisions of the two Acts" (47 U.S.C. § 551 and § 222), indicating that an opt-out approach would be quite

Privacy Act allows use of viewing information internally within a business operation and release of "category" information externally if the vendor posts a notice and allows individuals to opt-out.[27] Finally, EPIC's observations about Congressional actions to constrain government's access to individually-identifiable information[28] says nothing about access and the use of such information generated *within* a relationship by one party to a relationship.[29]

Tellingly, the statutes referenced by EPIC have not been subject to constitutional challenge and represent -- at least on their face -- not unreasonable accommodations of First Amendment rights. Moreover, more recent legislative proposals and deliberations continue to support opt-out approval mechanisms as representing the appropriate balance between commercial productivity and efficiency and privacy.[30]

2. EPIC Provides no Facts of Privacy Invasion

EPIC cites to publications addressing Americans concerns about privacy in the context of on-line activities.[31] Such "evidence" of privacy angst, particularly in a wholly different context

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appropriate under Section 222 given the similar legislative structure and language of the provisions).

[27] 18 U.S.C. § 2710(b)(2)(D)(ii).

[28] EPIC at 4. *And see* Mpower at 4-5.

[29] *See* 18 U.S.C. § 2703(c), prohibiting certain service providers from releasing customer transactional data to the government without legal process, but putting no constraints on those service providers with respect to voluntary releases to other parties.

[30] As AWS points out, proposed legislative bills continue to reflect opt-out approval mechanisms. AWS at 4-5 n.13. This suggests that past Congressional enactments endorsing opt-out approval models were not aberrant or extraordinary. *And see* Verizon at 5-6 nn.8-9 and Verizon Wireless at 8-9 nn.21-22 (both referencing testimony before Congress in May, 2001, by privacy experts such as Alan Westin and Fred H. Cate, to the effect that individuals are often quite accepting of individually-identifiable information being used to promote customer convenience and commerce if there is an opportunity to opt-out).

[31] EPIC at 4 and n.13, 5 and n.24, referencing supporting documents that appear to involve only or primarily online activities or cyberspace. Their relevance to the instant case is not sufficient to support an affirmative CPNI approval process.

than that at issue here, is clearly not sufficient to sustain an opt-in CPNI approval mandate. As the Tenth Circuit stated, the government cannot satisfy the *Central Hudson* test "by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served."[32] For EPIC to provide the Commission with the requisite foundation to successfully defend an opt-in CPNI approval regime, it must correlate a specific privacy interest with a narrowly-tailored government protection. *It fails to do so.*

EPIC's attempt to prove that CPNI is seriously sensitive information that can support a substantial governmental interest[33] fails because it ignores several pertinent considerations. It fails to analyze how its position squares with the fact that Americans are not a monolithic block when it comes to matters of privacy and information use.[34] Furthermore, it ignores the fact that, although the Tenth Circuit acknowledged that some CPNI might be deemed sensitive,[35] it nevertheless expressed considerable skepticism about the strength of the government's interest.[36] Finally, EPIC's argument fails to address existing record evidence that shows that individuals do

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[32] *U S WEST v. FCC,* 182 F.3d at 1235.

[33] EPIC at 4 n.12 and accompanying text (citing to a case involving the Fourth Amendment constitutional right to privacy, *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting)).

[34] *See* Westin Jan., 1997 Letter at n.2 ("Approximately 16 percent of the public are 'privacy unconcerned' and, for them, there is very little in the way of personal information which they deem to be 'sensitive.' Another approximately 24 percent of the public can be classified as 'privacy fundamentalists' and, for them, almost any personal information is deemed to be quite sensitive. The majority of the American public, approximately 60 percent, can be usefully categorized as 'privacy pragmatists.' For them, the sensitivity of personal information will vary . . . as will their tolerance for the disclosure and use of . . . information.").

[35] *U S WEST v. FCC,* 182 F.3d at 1229 ("sensitive nature of some CPNI, such as when, where, and to whom a customer places calls").

[36] *Id.* at 1234-35.

understand opt-out approval models, have used them,[37] and are irritated -- not pleasantly engaged -- by opt-in CPNI requirements.[38]

EPIC argues that an opt-out CPNI approval mechanism cannot protect customers' privacy in a CPNI context "because it is not calculated to reasonably inform consumers about their privacy options."[39] It continues that an opt-out process would put "the burden on the customer to pay for and return their opt out notice."[40] What EPIC continues to ignore is that an opt-in requirement burdens the First Amendment rights of speakers and interested listeners. If the concept of "informed consent," as articulated by EPIC, were sufficient to override constitutional considerations, the Commission's original *CPNI Order* would not have been vacated. If the Tenth Circuit's opinion means anything, it is that the burden of expressing a preference with respect to the use of CPNI be placed on individuals who may have a strong position on the matter, rather than on individuals who have no position or not a strong position adverse to such use.

In all events, EPIC's claims that an opt-out process cannot satisfy the "approval" requirement of Section 222 is entirely hypothetical and speculative. The Tenth Circuit, of course, has held that speculation cannot form the basis for a government regulation impinging on

[37] Qwest at 12-13 nn.45-46. *And see* Westin Survey at page 9 ("Analysis of the people who have used opt outs indicates that they are at the highest levels of privacy concern").

[38] CenturyTel at 6 (noting that in its experience customers become vexed when asked by the carrier if CPNI can be used for purposes of discussion about other services), 11-12. *Compare* Verizon at 4 and n.5 (citing to Supplemental Comments of Bell Atlantic, CC Docket No. 90-623 at Att. 2, filed May 5, 1994, attached to Reply Comments of Bell Atlantic, CC Docket No. 96-115, filed June 26, 1996).

[39] EPIC at 5.

[40] *Id.*

lawful speech.[41] EPIC makes no attempt to demonstrate how its advocacy would survive the judicial directive. Indeed, EPIC's claims are not merely unsupported, but are refuted by the fact that there is a range of approaches to the "opt-out" choice (*e.g.*, telephone calls, electronic messaging) that can satisfy the approval requirements,[42] particularly when that requirement is construed -- as it must be -- in a manner consistent with the Constitution.

Other of EPIC's listed infirmities with an opt-out CPNI approval process are similarly speculative and -- even if proven -- are clearly insubstantial from the perspective of governmental interests and privacy protection. Its concerns, for example, that notices may get lost under a pile of other less important mail (including other notices), may not be paid attention to by consumers or may be written in unintelligible language,[43] are rank speculation, at least with respect to CPNI and any future carrier notices. If EPIC or a consumer finds fault with a specific carrier notice, either can file a complaint with the Commission.[44] The fact that this less restrictive alternative is available defeats all of EPIC's "list of horribles" associated with an opt-out CPNI approval process.

Moreover, even if EPIC 's observations were not entirely speculative, they would not support the arguments it advances. The government cannot depress the communication of lawful speech to potentially interested persons in order to protect uneducated, inattentive adults. The

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[41] *U S WEST v. FCC*, 182 F.3d at 1237. *And see* CenturyTel at 5 ("the *CPNI Order* is void of any empirical explanation or justification for the government's interest in protecting privacy"); Nextel at 4 ("The argument of opt-in advocates that a customer's failure to opt-out may not be construed as constituting informed consent is based on nothing more than speculation").

[42] *See Second Further Notice* at ¶ 9. *And see* Verizon Wireless at 5; Cingular at 6; AT&T at 6 n.4; *and see* CenturyTel at 11 (apparently intending to use just a reply card).

[43] EPIC at 5-6.

[44] 47 U.S.C. § 208 does not require specific injury or harm to an entity before a complaint can be filed. While a defense associated with "standing" may be lodged, the resolution of the matter is discretionary, not preemptive.

notion that government must intervene to protect customers whom it believes are incapable of responding to an opt-out notice sent to them by first-class mail reflects the kind of paternalistic attitude that the Supreme Court has repeatedly rejected as justification for restrictions on commercial speech.[45] The Constitution requires that the burden of overcoming inertia be placed on those who wish to restrict the dissemination of information, not on speakers or interested audiences.[46]

B. Mpower Fails To Make A Case For An Opt-In Requirement For CPNI Usage

Mpower presses an opt-in CPNI approval mechanism with respect to a certain sub-element of CPNI. Mpower argues -- based on its "belief"[47] -- that the Commission should differentiate between two kinds of CPNI, *i.e.,* CPNI dealing with facilities/feature information (*e.g.,* a particular customer has two lines and subscribes to Caller ID) and usage information (*e.g.,* a number called, date, time, length of call). For CPNI usage information, Mpower

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[45] *See 44 Liquourmart v. Rhode Island*, 116 S.Ct. 1495, 1507 (1996) (principal opinion); *Edenfield v. Fane*, 507 U.S. at 767; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976). *See also* AT&T at 7 (noting that the Supreme Court has refused to find that consumers interested in a subject matter "would fail to protect themselves"); Nextel at 5 ("The arguments of opt-in advocates rest on the paternalistic and unsupported assumption that consumers are either too uninformed or too disengaged to act to control the use and disclosure of . . . CPNI.").

[46] *See U S WEST v. FCC,* 182 F.3d at 1239 (asserting that it is speculative to assume such individuals will not act). *And see* AT&T at 6 ("[a]s for those customers who decline to opt out, there is no reason to believe that they place a high value on keeping their CPNI private"); Nextel at 3 ("there is no evidence that a customer opposed to a carrier's use or disclosure of his or her CPNI outside the customer's existing . . . relationship with that carrier would not opt-out from such use and disclosure"). *See also* note 37 *supra.*

[47] Mpower "believes that there is a basic underlying issue regarding the definition of CPNI . . . [and] believes that whereas opt-out approval would be adequate for [Customer Facilities Information] CFI/CPNI . . . that opt-in customer approval is required before use of CPNI usage information/[Customer Usage Information] CUI in order to protect customer privacy rights." Mpower at 1-2, 10. In addition to its belief, Mpower, expressing its sensitivity to the Tenth Circuit's differentiation between "target" and "broadcast" speech, apparently would have the Commission abdicate that opinion in favor of the sympathies of the minority. *Id.* at 8. Of course, the Commission is in no position to do so.

proposes an opt-in approval requirement. For a number of reasons, the Commission should reject Mpower's advocacy.

Mpower fails to provide any empirical evidence to support its position that CPNI -- including usage information -- constitutes "vitally important personal information" or "highly protected and extremely invasive" information.[48] This is a fatal flaw in its advocacy, all the more so since individuals do not share a single "privacy position" with respect to individually-identifiable information,[49] and customers must appreciate that their serving carriers generate this kind of network information which often appears as call detail on their bills. Moreover, even if there were evidence that some customers believe that CPNI usage information is more sensitive than other CPNI information, no evidence has been presented to show that such concern can be addressed only through an opt-in regulatory regime.[50]

Mpower fails to show a substantial governmental interest to support its bifurcated CPNI approval proposal,[51] fails to show how an opt-in process would support the speculative

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[48] *Id.* at 4-5.

[49] *See* note 34, *supra.*

[50] Indeed, the experiences of CenturyTel suggest that this kind of information is discussed with customers by service representatives (carriers discuss "with the customer his or her calling patterns, such as the time of day the customer most frequently makes calls") and that customers are irritated when asked to "approve" of its use, since the information is already in the carrier's possession. CenturyTel at 6. *And see* note 38, *supra.*

[51] Mpower references the European Union and how that Union approaches the matter of informational privacy (Mpower at 5-6). This reference fails as compelling evidence on the issue of how CPNI information (usage or not) should be treated in the United States given the legal and regulatory differences toward the matter of information collection and informational privacy. As the Department of Commerce itself has noted, "While the United States and the European Union share the goal of enhancing privacy protection for their citizens, the United States takes a different approach to privacy from that taken by the European Union. The United States uses a sectoral approach that relies on a mix of legislation, regulation, and self regulation. The European Union, however, relies on comprehensive legislation that, for example, requires creation of government data protection agencies, registration of data bases with those agencies, and in some instances prior approval before personal data processing may begin. As a result of

governmental interest across a broad range of customer sensitivities, and -- most certainly -- fails to show how its proposal is narrowly-tailored. Narrow-tailoring requires that the Commission not impose an opt-in CPNI approval mandate with respect to CPNI usage information in the absence of its ability to meet the *Central Hudson* test. Qwest questions if that is possible, given that carriers might legitimately communicate CPNI usage information within a corporate family and to customers. For example, a carrier might craft a customized package for a customer based on his/her calling patterns.[52] The service would be based on lawful and truthful information and might well promote the customer's commercial interests. Since the Tenth Circuit already considered the use of CPNI usage data within the context of its analysis;[53] and in that context struck down the Commission's rules, Mpower presents no argument that the Commission could adopt in conformity with the Constitution.[54]

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these different privacy approaches, the Directive could have significantly hampered the ability of U.S. companies to engage in many trans-Atlantic transactions." www.export.gov/safeharbor. It is certainly not for this Commission to craft CPNI rules that seek to accommodate the globalization of commerce. That is for other administrative agencies, who have the matter well in hand. *See, e.g.*, www.export.gov/safeharbor for a complete discussion of the Safe Harbor information protection policy negotiated by the Department of Commerce with the European Union.

[52] A carrier might decide to craft the package utilizing the entire 11-digit dialing pattern call detail (1-NPA-NXX-xxxx). Indeed, this was the idea around the "Friends and Family" toll package promoted by then MCI. Or it might determine the package is more diplomatically fashioned as an "NPA" package or an "NPA/NXX" package. In all events, the call detail provides the raw data on which to craft the package and communicate its contents. And, significantly from a constitutional perspective, the determination regarding the extent of CPNI used with respect to the product offering is not a governmental one.

[53] *U S WEST v. FCC,* 182 F.3d at 1229.

[54] Mpower also argues that because of certain CPNI "abuses," the Commission should establish some type of lag between the time a customer leaves an incumbent local exchange carrier and the time a winback contact is made. Mpower at 9-10. The Commission should not adopt Mpower's position. From the content of its filing, it is obvious that state authorities are addressing the need for a lag period. A rule applying ubiquitously to all carriers is not in order and would deprive consumers of the benefit of winback communications. *CPNI Reconsideration Order,* 14 FCC Rcd. ¶¶ 69, 72.

C. Opt-In CPNI Approvals Cannot Be Mandated For Third-Party Disclosures Generally

Isolated comments in the filed submissions can be read to suggest that there is something especially pernicious about disclosure of CPNI to third parties,[55] and state or imply that an opt-in process is more justifiable for such disclosures. However, no commentor provides any analysis under *Central Hudson* or the Tenth Circuit's decision to support such a position. Given the absence of evidence to support a broad governmental prescription regarding CPNI releases to third parties, the Commission cannot demonstrate there is no more narrowly-tailored means to reasonably regulate such disclosures.

As Qwest explained in its opening Comments, an opt-in CPNI approval process cannot lawfully be mandated by the government across the board, with respect to all third parties and all types of disclosures.[56] The best practice is to allow the carriers themselves to determine the appropriate scope of CPNI disclosures to third parties, as disciplined by market forces.[57] Unless or until, through a private complaint or regulatory enforcement action, a carrier's actions are

[55] *See* Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 4 ("the distribution of CPNI to unauthorized third parties may cause distress to consumers, and prohibitions against such abuses are warranted" and referencing concerns about "review" of individually-identifiable information by "nonaffiliated entities"). It may be that OPASTCO does not mean to create such a suggestion and means "unauthorized" third parties who receive CPNI without permission from either the carrier or the customer (such as a hacker) and means the term "abuses" to reference similar inappropriate conduct. *And see* USTA at 12 (referencing a different statute, but noting that "The consumer's expectations in terms of having information shared or sold and being marketed to [sic] companies they had no previous relationship with has raised concerns in some quarters"), 13 (stating that Section 222 requires that "carriers not share consumer CPNI with third parties").

[56] Qwest at 14-16.

[57] AT&T at 7; Cingular at 2-3, 4; OPASTCO at 5. Market forces would include not only competitive alternatives, such that a customer could change providers if he/she disliked the CPNI usage policy or practices of a particular carrier (*see* AT&T at 7; OPASTCO at 5) or file complaints (Sprint at 6), but also self-regulatory conduct such as that described by CTIA at 12-15 and DMA at 5-6 (referencing DMA's long-standing policy and guidelines regarding marketing contacts).

determined to be unreasonable, carriers should not be presumed to act in a manner that compromises their customers' privacy expectations. This is especially true in light of the variety of reasonable CPNI releases that can be anticipated and the limited record evidence of individuals' aversion to such information releases.[58]

Some carriers urge the Commission to force carriers to release CPNI to unaffiliated entities pursuant to any opt-out approval process instituted by the carrier holding the CPNI at issue.[59] The Commission should reject this advocacy, since it has already struck a reasonable balance in its interconnection proceedings on the issue of third-party access to CPNI. Carriers are permitted access, through Operational Support Systems ("OSS"), to CPNI contained in customer service records ("CSR") for legitimate purposes (to initiate or render service, *i.e.*, "preorder" and "order" conduct).[60] So long as incumbent carriers do not demand unduly

[58] The record evidence of customer expectations associated with third-party releases has generally been confined to the release of information for marketing purposes. *See* Comments of Cincinnati Bell Telephone Company, CC Docket No. 96-115, filed June 11, 1996, Appendix A, Report by Aragon Consulting Group, Page 2, "Question: How concerned would you be if [CPNI] was provided to other companies -- not CBT -- in order for those companies to send you information regarding the products and services that they offer?", with the result that "almost half of the respondents surveyed (49.8%) indicate that they would be 'extremely concerned' (rating of 9 or 10 on a 10-point scale)." *And see* USTA at 12. However, to the extent carriers release information in different contexts, or where the third party is affiliated with the carrier such that there is a form of "joint marketing," the record evidence fails to support any need to establish the kind of high barrier to communication that an opt-in mandate imposes.

[59] While WorldCom makes this argument with respect to both incumbent local exchange carriers and BOCs (WorldCom at 7-11), AT&T and Nextel confine their advocacy to situations where a BOC might seek -- through an opt-out approval mechanism -- to share CPNI with a Section 272 Affiliate (AT&T at 15-16; Nextel at 9-13).

[60] Qwest at 14-15 and n.51. *And see CPNI Order*, 13 FCC Rcd. at 8178 ¶ 166. *Compare* Mpower at 8 (arguing that CPNI should be available to competitive local exchange carriers, but that usage information should be available only pursuant to affirmative opt-in consent).

Qwest agrees with WorldCom that the Commission's current interpretation of Section 222(d)(1), to grant exemptions from the CPNI rules only for the holder of the CPNI, is too narrow a construction of the plain language. *See* WorldCom at 9 n. 19. That subsection is better read to

burdensome customer approval requirements from new entrants (the most often complained of approval requirement is that the consent be in writing), and incumbent carriers permit access to the information when a customer has "approved" (whether orally, electronically, or in writing) such access, new entrants have little to complain about. The process allows for access to necessary information in those contexts where an individual has acknowledged the need for the information to be provided (*i.e.*, desires information from the provider or wants the provider as his/her carrier). There is nothing about this *Second Further Notice* proceeding that requires the existing regulatory framework be changed or modified.

## III. THE COMMISSION IS NOT FREE, AS ADVOCATED BY SOME, TO CHANGE COURSE WITH RESPECT TO THE INTERPLAY BETWEEN SECTIONS 272 AND 222. A CHANGE IN POSITION WOULD BE ONE OF CONSTITUTIONAL SIGNIFICANCE

A few commenting parties, specifically the Association of Communications Enterprises ("ASCENT"), AT&T, Nextel and WorldCom, take the position that the communication of CPNI between a BOC and a Section 272 Affiliate should be burdened beyond the approval processes already inherent in Section 222.[61] These parties argue that Section 272 imposes an additional regulatory gloss on the BOC/Section 272 Affiliate relationship.

ASCENT, AT&T and WorldCom argue that there really would be no burden at all imposed by determining that Section 272 applies to CPNI sharing between a BOC and its Section 272 Affiliate in an opt-out context, since a BOC need simply include a statement in its notice and opt-out communication that it will share CPNI with its affiliates and any/all carriers

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permit -- but not compel -- carriers to use or disclose CPNI in the context of (d)(1) activities, even if those activities are "other service provider" activities.

[61] Mpower addresses the matter obliquely as one involving the state of competition in the industry, quoting at some length from the minority opinion in *U S WEST v. FCC*, 182 F.3d at 1245. Mpower at 7-8. Mpower's arguments have not only been addressed adversely to wit by

that ask for it, if the individual does not contact the BOC to object.[62] As AT&T so bluntly puts it, "In soliciting approval, the BOC would have to present the customer with an all-or-nothing choice: Either the customer opts-out of CPNI transfers to other carriers and section 272 Affiliates, or he does not opt-out at all."[63] So much for customer convenience or the public interest.

Nextel has a slightly different approach to the matter. It asserts that "[a]llowing BOCs to share CPNI with their affiliates through an opt-out mechanism to market new services, while requiring that the customer submit an affirmative **written** request before such information may be disclosed to the BOCs' competitors . . . would enable BOCs to use . . . CPNI" in a manner providing the affiliate with an unfair competitive advantage.[64] Nextel simply rehashes the

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the majority opinion in *U S WEST v. FCC*, but by earlier Commission declarations. *See* Qwest at 10-11 and n.38. Thus, its arguments lack any persuasive authority.

[62] ASCENT at 5 ("Under an opt-out approach, Section 272, as well as Section 222, could be satisfied through transmission of a single notice to customers which provided them with the option of blocking disclosure of their CPNI to both BOC affiliates and unaffiliated competitors"); AT&T at 15 ("all the BOC would have to do in order to comply with section 272 is obtain from the customer a blanket approval covering third parties as well as section 272 affiliates. . . A BOC could satisfy the requirements of section 222 and section 272 simply by sending a single notice to the customers informing them of their opt-out rights."); WorldCom at 11 ("If a BOC intends to seek consent for access by its affiliate under the opt-out approach, the BOC notification should also disclose that it will make access to such information available to unaffiliated entities on the same terms").

[63] AT&T at 15 n.10. *Compare* WorldCom at 11 ("If the BOC does not intend to disclose the information to the affiliate . . . it would not be required to provide [a] notification on behalf of, or disclose the information to, unaffiliated entities").

[64] Nextel at 2-3 (emphasis added), 13. It is not true, of course, that BOCs only share CPNI with other carriers when there is written consent from the customer. *See* Qwest at 15 and n.51.

It is not clear what the scope of the Nextel argument really is. While couched, most often, within the context of BOCs' sharing with Section 272 affiliates, at one point Nextel is arguing against BOC sharing with a wireless affiliate (*see* Nextel at 12, "a BOC could share a customer's CNPI . . . to market its CMRS services") -- something not impacted by the interplay between Sections 272 and 222.

"competition" argument which the Tenth Circuit has already dismissed.[65] As the Court made clear, intra-corporate speech, including speech between a carrier and its wireless and long distance affiliates[66] is protected by the First Amendment -- whether a carrier is a BOC or not. And, given Congress' express grant of joint marketing authority with respect to wireless and long distance services,[67] it is impossible to argue that, in passing the Telecommunications Act of 1996, Congress intentionally acted in a manner that would depress truthful communications about a carrier's services, even if a carrier offered more than one type of telecommunications service.

The Commission is not free to adopt the advocacy of the parties. It cannot fashion a CPNI approval process that permits BOCs only to share CPNI with a Section 272 Affiliate if they treat other carriers as if there were an affiliation where there is none. Such approach would, at a minimum, potentially compromise their customers' expectations. Nor can the Commission mandate that a BOC treat its own affiliate as if there were no affiliation with respect to CPNI sharing. The Commission has acknowledged that according Section 272(c)(1) any statutory prominence with respect to CPNI matters would put a BOC in an untenable position.[68] It would also be an unconstitutional one.[69]

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[65] *U S WEST v. FCC*, 182 F.3d at 1236-37.

[66] *See* note 12, *supra*.

[67] *See* 47 U.S.C. § 152 note (Section 601(d) of the Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, 110 Stat. 56, 114 (Feb. 8, 1996)) (wireless) and § 272(g)(3) (interexchange long distance). *And see AT&T Corp. v. FCC*, 220 F.3d 607, 632 (D.C. Cir. 2000).

[68] *See CPNI Order*. 123 FCC Rcd. at 8175 ¶¶ 160, 162 (imposing § 272 obligations with respect to BOC/Section 272 Affiliate sharing could potentially undermine customers privacy interests); ¶ 161 (imposing § 272 nondiscrimination obligations could result in BOCs choosing "not to disclose their local service CPNI [to] avoid [the] obligations"); *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 142; *AT&T/Bell Atlantic Complaint*, 15 FCC Rcd. 19997, 20005 ¶ (2000).

[69] Professor Tribe has advised the Commission that framing the choice this way would result in a violation of the constitution with respect to Section 272 as applied. *See* Letter from Kathryn

In addition to raising constitutional concerns, replacing "opt-in" regulations with additional CPNI burdens or restrictions on BOCs would be at odds with prior considered Commission determinations. The Commission has three times engaged in statutory interpretation analyses of the interplay between Sections 272 and 222. Each time, the Commission has determined that Section 222 controls the matter of CPNI sharing between a BOC and its Section 272 Affiliate. The Commission is not free to simply divorce itself from those prior interpretations,[70] particularly in light of its conclusion that the interpretation was invited and buttressed by the structure of the Telecommunications Act itself.[71]

The Commission also resolved the issue of statutory primacy as between Sections 222 and 272 on policy considerations, involving not only customer convenience and economic efficiency,[72] but market considerations, as well. The Commission has expressed its desire to allow for the creation of a comparable marketing environment for incumbent interexchange

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Marie Krause, Senior Attorney, U S WEST, Inc. to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, dated June 2, 1997, transmitting Letter from Laurence H. Tribe, to Mr. A. Richard Metzger, Deputy Bureau Chief, Federal Communications Commission *et al.*, dated June 2, 1997 ("Tribe June 2, 1997 Letter"), at 2, 4-5, 10-14 (unlawful condition); Letter from Kathryn Marie Krause, Senior Attorney, U S WEST, Inc. to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, dated September 10, 1997, transmitting Letter from Laurence H. Tribe, to Mr. A. Richard Metzger, Deputy Bureau Chief, Federal Communications Commission *et al.*, dated June 10, 1997 at 1-2, 3, 6 (unlawful condition).

[70] *See, e.g.*, BellSouth at 8-9, Qwest at 25; SBC at 16-22; Verizon at 9-11.

[71] *See CPNI Reconsideration Order*, 14 FCC Rcd. ¶¶ 141-42.

[72] *See id.* ¶¶ 137, 142. "[T]he Commission's construction of section 222 as expressing pro-competitive concerns was only one of the several reasons why the Commission construed section 272(c)'s reference to 'information' not to include CPNI. The Commission also so concluded in order to 'further the principles of customer convenience and control,' and protect 'customer's privacy interests.' Moreover the Commission was concerned that a reading of section 272 such as that advocated by AT&T here [requiring nondiscriminatory treatment of CPNI] would lead BOCs to 'simply choose not to disclose their local service CPNI,' which 'would not serve the various customer interests envisioned under section 222." . . . Accordingly, because we conclude that section 272(c)'s reference to "information" does not include CPNI". *AT&T/Bell Atlantic Complaint*, 15 FCC Rcd. at 20004-05 ¶¶ 18-19. *See, e.g.*, BellSouth at 9-10; SBC at 17-22.

carriers and new-entrant BOCs, at the time a BOC began offering interexchange services.[73] Nothing about the Tenth Circuit's opinion requires a revisitation of this matter and the Commission should decline to undertake such action.

## IV. CONCLUSION

For all of the reasons set forth above, the Commission should reject continued requests, over the objection of the overwhelming majority of commentors, that it infringe protected speech by mandating an opt-in requirement. The Commission should likewise deny requests that it reconsider its repeated holdings that Section 272 does not impose additional restrictions on the use of CPNI between a BOC and its Section 272 Affiliate not found in Section 222.

The Commission can avoid continued and unsettling controversy over the proper format and scope of CPNI approvals by deferring to the Congressional directive of Section 222. A CPNI approval model imposing directly on carriers the responsibility for compliance with Section 222, as disciplined by market forces, promotes the deregulatory emphasis of the Telecommunications Act. Yet, it allows for Commission enforcement actions in cases of carrier misfeasance to ensure compliance and protection of the public interest.

Should the Commission determine that reliance on market forces and regulatory enforcement capabilities is insufficient for proper administration of Section 222 and that more formal regulations are required, those regulations must conform to constitutional imperatives.

[73] *CPNI Order*, 13 FCC Rcd. at 8178 ¶ 167 and n.581. *See* Verizon at 11-12.

The only assured CPNI approval process to measure up to this standard is an opt-out one. Such approach fairly balances governmental, privacy and commercial interests in a manner consistent with the constitution and sound public policy.

Respectfully submitted,

QWEST SERVICES CORPORATION

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Kathryn Marie Krause
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(303) 672-2859

Its Attorneys

November 16, 2001

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST SERVICES CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System; and 2) served via email on the parties listed below.*

Richard Grozier
Richard Grozier

November 16, 2001

*Consistent with Section 1.47(d) of the FCC's rules, these parties have agreed to accept service via electronic mail. Alternatively, a hard copy of these Reply Comments can be obtained by telephoning Kelseau Powe at 202-429-3114.

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CC96-115b.doc
Updated 11/16/2001

# Federal Communications Commission

## The FCC Acknowledges Receipt of Comments From ...

## Qwest Services Corporation

## ...and Thank You for Your Comments

**Your Confirmation Number is: '2001116925949'**

**Date Received: Nov 16 2001**

**Docket: 96-149**

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*updated 10/17/2001*

# Federal Communications Commission

## The FCC Acknowledges Receipt of Comments From ...

## Qwest Services Corporation

## ...and Thank You for Your Comments

Your Confirmation Number is: '200111675900'

Date Received: Nov 16 2001

Docket: 96-115

Number of Files Transmitted: 1

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*updated 10/17/2001*

TAB F

EX PARTE OR LATE FILED

CC 96-115

DOCKET FILE COPY ORIGINAL

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Washington, DC 20036
202 429-3134
FAX 202 296-5157

Eltridge A. Stafford
Executive Director-
Federal Regulatory



U S WEST



**EX PARTE**

January 27, 1998

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M Street, NW, Room 222, SC-1170
Washington, DC 20554

RE: Customer Proprietary Network Information, CC Docket No. 96-115,
Non-Accounting Safeguards, CC Docket No. 96-149

Dear Ms. Salas:

In accordance with the Commission's rules governing ex parte presentations, please be advised that today, Kirven Gilbert, BellSouth, Robert Gryzmala, SBC, Kathryn Krause, U S WEST, Joseph Mulieri, Bell Atlantic, Michael Pabian, Ameritech, and the undersigned met with James Casserly, Senior Legal Advisor to Commissioner Ness. The purpose of this meeting was to present a coalition position on CPNI issues. The attached material covers the points that were discussed.

In accordance with Section 1.1206(a)(2) of the Commission's Rules, the original and one copy of this letter are being filed with your office for inclusion in the public record for the above-mentioned proceedings. Acknowledgment of date of receipt of this transmittal is requested. A duplicate of this letter is provided for this purpose.

Please contact me if you have any questions.

Sincerely,

Eltridge Stafford

Attachment

cc: Mr. James Casserly

U S WEST, Inc.
Suite 700
1020 Nineteenth Street, NW
Washington, DC 20036
202 429-3134
FAX 202 296-5157

Eldridge A. Stafford
Executive Director-
Federal Regulatory

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JAN 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Sincerely,

Eldridge Stafford

Attachment

cc: Mr. Kyle Dixon

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Eldridge Stafford

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cc: Mr. Kevin Martin

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Eftidge A. Stafford
Executive Director-
Federal Regulatory

U S WEST



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In accordance with Section 1.1206(a)(2) of the Commission's Rules, the original and one copy of this letter are being filed with your office for inclusion in the public record for the above-mentioned proceedings. Acknowledgment of date of receipt of this transmittal is requested. A duplicate of this letter is provided for this purpose.

Please contact me if you have any questions.

Sincerely,

Attachment

cc: Mr. Paul Gallant

# A Coalition Position on CPNI

**CC Docket No. 96-115**

**and**

**CC Docket No. 96-149**

**January 27, 1998**

**Ameritech**
**Bell Atlantic**
**BellSouth**
**SBC**
**U S WEST**

January 27, 1998

# Outline of
# Coalition Positions on CPNI

- CPNI Rules Must Accommodate Customers' Reasonable Expectations of Privacy:
  - Where there is an Existing Business Relationship, Notice & Opt-Out is the Best "Approval" Method for Both Customers & Carriers,
  - Where there is an Existing Business Relationship, an Affirmative Consent Requirement Would be Bad for Consumers and Their Serving Carriers,
  - Notice & Opt-Out Promotes First Amendment Values,
  - Disclosure of CPNI to Any Party Outside the Carrier's Corporate Family Requires Specific Customer Authorization.
- The Act Requires Even-Handed Application of Section 222 to All Telecommunications Carriers.
- CPNI is Central to Joint Marketing.
- The FCC's Approach to Interpreting "Telecommunications Service" Should Be Guided by Customer Expectations and Reflect Converging Technologies and Services.
- The BOC-specific CPNI Rules Have Been Displaced by Section 222.

# CPNI Rules Must Accommodate Customers' Reasonable Expectation of Privacy

- Section 222 is intended to preserve, not sacrifice, customer privacy expectations.
- A significant majority of customers trust their current carriers to use and protect their record information [Westin study, Q 2C].
- Customers expect their current carrier [Westin study] and affiliate companies [CitiBank study] to use their CPNI to market, provision, and provide customer care across a range of products and services - a/k/a "one-stop shopping."
- Some market segments have an even greater interest in receiving product information from businesses they patronize [Westin survey, Q 7 &9]:
  - Younger Americans
  - African Americans
  - Hispanics
  - Women.

# Where There is An Existing Business Relationship, Notice & Opt-Out is The Best "Approval" Method for Both Customers & Carriers

- **Notice & Opt-out is Best for Relationship:**
  - Consistent with statutory language and legislative history
    - Earlier iterations of statute include term "affirmative;" deleted from Section 222,
  - Is consistent with Commission policy with respect to privacy and commerce (e.g., CPNI multiline requirements, TCPA proceeding, CPN proceeding),
  - Reflects other industries' methods (marketers, cable companies, video rentals)
    - Consumers have familiarity with approach.
- **It is Best for Consumers:**
  - Does not impose burdens on consumers to take their valuable time to affirm reasonable consumer expectations and commercial practices (use of commercial information, sharing among affiliate corporations),
  - Record evidence demonstrates that use of "notice & opt-out" increases customer comfort with internal use of CPNI (Westin Survey, Q 11 & 12),
  - Is a model generally endorsed by Administration privacy efforts,
    - NTIA
    - IITF Privacy Working Group.

# Where There is An Existing Business Relationship, Notice & Opt-Out is The Best "Approval" Method for Both Customers & Carriers

- **It is Best for Business:**
  - Does not impose burdens that would impede legitimate and expected commercial uses of business information, including target marketing,
  - Accommodates fair CPNI practices by providing full and fair disclosure to customers to exercise their personal choice regarding those uses,
  - Comports with customers' expectations that their carrier--
    - will protect the privacy of their CPNI, and
    - will communicate with them from time to time regarding services/products they may need or want.

# Where There is An Existing Business Relationship, An Affirmative Consent Requirement Would Be Bad For Consumers and Their Serving Carriers

- **An affirmative consent requirement imposes an unwarranted "need to act" on consumers to maintain the *status quo*:**
  - Record evidence supports consumers comfort with *status quo* (internal use is expected; third-party disclosure should be supported by something more),
  - CPNI use is not a matter of significant interest to consumers and it is difficult to create reflection and engagement on the issue,
  - Except where consumer initiates transaction during which CPNI use is discussed, **predictable** consumer inertia results in affirmative consent <u>not</u> being provided,
    - written approvals cannot be secured and are at odds with movement toward "paperless society,"
    - 90% oral approval on inbound calls does not translate into high overall number of approvals because only 15% of customers place calls to the business office (Ameritech),
    - Outbound calls in particular do not replicate the inbound calling experience; customers are disinterested, perplexed, and telephony averse (U S WEST).

# Notice & Opt-Out Promotes First Amendment Values

- If failure to secure affirmative consent denies a carrier's access, use and disclosure of CPNI across affiliate companies, a carrier is cut off from valuable commercial information.
- Lawful and legitimate uses of commercial record information facilitate:
  - Targeted marketing to those individuals most likely to be interested in product/service,
  - Outbound telemarketing efforts to both existing customers (based on known characteristics) and potential customers (based on predictions).
- Restrictions on the use of commercial information, barring affirmative consent of the individual, compromise First Amendment values and depress lawful commercial speech.

## Disclosure of CPNI to Any Party Outside of the Carrier's Corporate Family Requires Specific Customer Authorization

- All telecommunications carriers have a legal duty to protect proprietary information of, and relating to, their customers.
- The Act is clear that if the customer requests in writing that their carrier disclose CPNI to any party, a carrier must do so.
- Telephone companies have earned customer trust by protecting their information from unauthorized release to third parties.
- Third party authorization methods must provide sufficient assurance that the customer has authorized the disclosure of CPNI:
  - U S WEST focus group [June 1996 Opening Comments FN42],
  - Cincinnati survey [June 1996 Opening Comments].

# The Act Requires Even-Handed Application of Section 222 to All Telecommunications Carriers

- Section 222 of the statute applies by its terms to all telecommunications carriers that receive or obtain CPNI:
  - Where Section 222, was intended to apply to fewer than all carriers, such intentions were expressly stated - e.g., Section 222(c)(3),
  - There are no BOC-only provisions in Section 222,
  - The legislative history associated with Section 222 demonstrates Congress' deliberate shift from BOC-only provisions to competitively neutral "every-carrier" provisions,
  - Congress sought to address, in a comprehensive way, both the privacy and competitive concerns associated with CPNI, by enacting Section 222,
  - CPNI issues are governed exclusively by Section 222.

# The Act Requires Even-Handed Application of Section 222 to All Telecommunications Carriers

- IXC CPNI is no less valuable than LEC CPNI:
  - AT&T boasts: "We now have a database with information about nearly 75 million customers. We know their wants, needs, buying patterns, and preferences,"
  - MCI claims databases that contain more than 300 million sales leads and up to 3,500 fields of information about 140 million customers and prospects,
  - Uneven application of Section 222 will burden individual carriers and interfere with efficient competition.

# CPNI is Central to Joint Marketing

- CPNI is critical to those activities the FCC has identified as basic to any joint marketing activity:
  - responding to customer inquiries,
  - performing sales functions,
  - processing orders for service requested,
  - other activities on a case by case basis.
- The Commission's orders recognize the value of CPNI to effective joint marketing:
  - identifying potential customers and formulating proposals to those customers - Phase II Supplemental NPRM, CC Docket No. 85-229, FCC 86-253, released 6/16/89, at para. 55,
  - identifying certain customers whose telecommunications needs are not being met effectively and to market an appropriate package of enhanced and basic services to such customers - Phase II Reconsideration. Order, 3 Rcd. 1150 (1988), para. 97.

# CPNI is Central to Joint Marketing

- A BOC's use of CPNI to support joint marketing and sales, or its providing CPNI to an affiliate for such purpose, are activities permitted to be done within Section 272(g)(3) on an exclusive basis.

## The FCC's Approach to Interpreting "Telecommunications Service" Should Be Guided by Customer Expectations and Converging Technologies & Services

- A narrow definition of "telecommunications service" would serve neither to protect consumer privacy nor promote competition.
- The FCC's original, tentative interpretation of "telecommunications service" is already out of date:
  - Services currently available to customers cannot easily be placed into one of three buckets, e.g., wireless/wireline,
  - The proposed buckets make no sense in the wireless context.
- Statutory language can be fairly construed to support a "single bucket" interpretation, encompassing all telecommunications service offerings made to a customer (comparison to Section 222(f); Section 222(c)(1)(B)).

# The BOC-Specific CPNI Rules Have Been Displaced by Section 222

- The Commission's Computer III CPNI objectives are met via the provisions of the 1996 Act.
- In enacting Section 222 Congress evidenced intent to be comprehensive and have one set of rules for the entire industry:
  - CI-III
  - CPE
  - Cellular.
- The Commission should implement one set of CPNI rules in accordance with the Act's clear mandate that all carriers and their customers be treated equally.

TAB G

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June 2, 1997

**EX PARTE**

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Mr. John Nakahata, Chief, Competition Division, Office of General Counsel
Federal Communications Commission
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Room 500 (Metzger)
Room 533 (Attwood)
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Washington, D.C. 20554

RE: Ex Parte Filing in CC Docket Nos. 96-115; 96-149; 96-162

Dear Messrs. Metzger and Nakahata and Ms. Attwood,

Enclosed please find an analytical piece authored by Professor Laurence H. Tribe regarding the First Amendment issues associated with U S WEST's access and use of Customer Proprietary Network Information ("CPNI") and the sharing of that CPNI among affiliated U S WEST companies. Professor Tribe was retained by U S WEST to conduct such an analysis. And, as he notes in his attached letter, he was retained on the condition that he exercise his independent judgment on the relevant First Amendment issues, whether or not they coincided with the business interests of U S WEST.

Professor Tribe's conclusions can be summarized as follows: CPNI is "information," the collection and distribution of which is protected under the First Amendment and the regulation of which is governed by free speech principles and precedents.

1. The CPNI owned by and in the possession of U S WEST was most often collected in the context of engaging in protected speech activities with its customers. It provides

the foundation for informed communication between U S WEST personnel and its customers -- a form of protected First Amendment speech.

2. The communication of CPNI between or among U S WEST corporate entities is itself a protected speech activity.

3. Given the clear First Amendment attributes of the above speech activities, statutes which might be interpreted either to impede U S WEST's use of CPNI or interfere with the communication of CPNI within its corporate family should be narrowly construed. Specifically, Section 222 -- which contains no affirmative approval requirement on its face -- should not be construed to require U S WEST to obtain affirmative customer approval before it can access or use its CPNI or share that CPNI with any of its affiliates (including a Section 272 affiliate).

4. Nor should U S WEST be put in the position where it must choose between exercising its free speech rights and respecting a customer's expectations of privacy. That would be an unlawful conditioning of U S WEST's constitutional rights. Thus, any requirement that a BOC must share CPNI equally as between an affiliated company and an unaffiliated telecommunications provider, or that a BOC must use the same process of customer approval for both entities, would be constitutionally suspect.

While certain BOCs, such as U S WEST and Pacific Telesis, have asserted in their advocacy that the CPNI proceedings do implicate First Amendment issues and principles, the propositions put forward by Professor Tribe are newly presented in the context of CPNI. They are, however, of long duration in the context of speech that naturally occurs within any business -- speech that drives organizational governance, marketing and sales, public policy, and other lawful business activities. Those employed by a business clearly have free speech rights to communicate factual, truthful information to others similarly employed and are encouraged to share information of importance to the business to advance the interests of that business. Those interests are sometimes purely commercial, sometimes of a policy nature, sometimes altruistic. But, in any event, the speech is clearly entitled to protection against governmental actions in the nature of overbroad governmental interference, prior restraints or censorship. Thus, while we request here only a limited action -- avoidance of the clearly unconstitutional device of prior customer approvals to access, use or share CPNI -- Professor Tribe's analysis indicates that the First Amendment must play a more significant role in all future analyses regarding CPNI communications.

During the course of his analysis. Professor Tribe repeatedly notes that a prior authorization requirement imposed on one of U S WEST's telecommunications carriers or mandated as a condition of sharing CPNI with other U S WEST affiliates would raise serious First Amendment issues. He states that it would be a mistake for the Commission to construe 47

U.S.C. Section 222 as authorizing such a requirement. Such burdens on the First Amendment ought to be imposed, if at all, he notes, only pursuant to the clearest and most unambiguous congressional mandate and after the most explicit congressional determination that the ends Congress seeks to achieve are worth the burdens on First Amendment rights the Commission is considering imposing. He concludes that the standard is not met in the current situation.

Professor Tribe's opinion involves the access, use and sharing of CPNI. That subject is implicated not only by the Commission's current and ongoing CPNI proceedings (CC Docket No. 96-115), but also its proceeding addressing the appropriate Section 272 affiliate safeguards (CC Docket No. 96-149) and the wireless safeguards proceeding (CC Docket No. 96-162). All these proceedings involve, to some extent, access, use and sharing of CPNI. While that sharing is sometimes discussed within the context of intra-corporate sharing, across product lines (for example, local service and wireless service), it also implicates inter-corporate sharing (between a U S WEST local exchange telecommunications carrier and a Section 272 affiliate, for example). The teachings of Professor Tribe's analysis is that within both of these contexts, U S WEST and its customers have protectable First Amendment free speech rights and that such rights would be severely and negatively impacted by a prior customer authorization approval requirement before CPNI could be accessed, used or shared.

The Commission itself, in its appellate capacity, has explicitly acknowledged the pro-competitive value in intra/intercorporate CPNI information sharing, including the consequential benefits to consumers. While that acknowledgment was made with a particular focus on the effect of such sharing on competition and the consumer marketplace, the underlying logic of the position is equally applicable to a CPNI First Amendment analysis. Not only from a competition and consumption perspective, but from a First Amendment one, as well, "maximum freedom" in accessing, using and sharing CPNI should be the goal. Certainly, there is nothing about the passage of Section 222 or its language that suggests a contrary position is required. Furthermore, such a position will clearly increase consumer awareness and choices. As the Supreme Court has well observed, "So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

Based on Professor Tribe's analysis, we urge the Commission to refrain from adopting a prior customer approval authorization for the use and sharing of CPNI within a single corporate enterprise. As Professor Tribe persuasively asserts, there are other approval models more aligned with the relationship between U S WEST and its customers and the protection of First Amendment values. For example, an opt-out process would fully address customers' privacy expectations (as required by Section 222), but would still permit communication to flow freely and spontaneously between U S WEST and its customers and within U S WEST itself.

Furthermore, while there may be certain "nondiscrimination" obligations imposed on a BOC's behavior *vis-a-vis* certain of its affiliates (Section 272(c)(1)), those obligations should be construed to require no more than that CPNI be provided equally to all those authorized to receive it. The process for securing the requisite approvals should not be required to be the same. Indeed, in fairness to customer privacy expectations, they cannot be the same. Consistent with First Amendment principles, U S WEST should be able to share CPNI based on an opt-out approval process. That free speech advancing model should not be extended to third parties who have no business relationship with the customer. Nor should the BOC be required to abandon that model for one involving an affirmative prior authorization in the name of "equality of access."

We appreciate your consideration of the attached analysis. As stated in the letter, we would welcome the opportunity to meet with you on these issues.

Sincerely,

Kathryn Marie Krause (RW)

Kathryn Marie Krause

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June 2, 1997

**EX PARTE**

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RE: Ex Parte Filing in CC Docket Nos. 96-115; 96-149; 96-162

Dear Messrs. Metzger, Nakahata and Ms. Attwood,

I am writing on behalf of U S WEST, Inc., a corporation whose affiliates include local telecommunications carriers, cellular and other wireless operations, database and publishing services (both print and electronic), Internet access and interactive electronic services, cable operations and an interexchange toll carrier (which, in the future, will function as a Section 272 affiliate). I have been retained to provide my legal opinion on the constitutionality of a regulatory mandate imposing an "affirmative customer approval requirement" before a U S WEST's carrier operation can access or use Customer Proprietary Network Information ("CPNI") internally or before it can share the CPNI with an affiliated company. This opinion is relevant to the Commission's ongoing proceedings in the above-referenced dockets.[1]

[1] I should note that I was retained on the condition that I would exercise my independent judgment on the First Amendment issue, whether or not it coincided with the business interests of U S WEST.

In the course of crafting this opinion, I have consulted not only Supreme Court precedent but also counsel for U S WEST and have been made aware of prior Commission decisions in the CPNI and privacy area. My conclusion is that an affirmative prior authorization approval requirement for a telecommunications carrier to access or use CPNI, or to share CPNI with an affiliate, would impinge seriously upon important First Amendment rights and that, even if it could in the end withstand the appropriate level of judicial scrutiny (something that is by no means clear and in fact seems doubtful), it would be a mistake for the Commission to construe 47 U.S.C. Section 222 as authorizing such a requirement. Such burdens on the First Amendment ought to be imposed, if at all, only pursuant to the clearest and most unambiguous congressional mandate and after the most explicit congressional determination that the ends Congress seeks to achieve are worth the burdens on First Amendment rights the Commission is considering imposing. That standard is not met here.

Executive Summary

CPNI is information the collection and distribution of which is protected under the First Amendment and the regulation of which is governed by free speech principles and precedents.

**1.** The CPNI owned by and in the possession of U S WEST was most often collected in the context of engaging in protected speech activities with its customers. It provides the foundation for informed communication between U S WEST personnel and its customers — a form of protected First Amendment speech.

**2.** The communication of CPNI between or among U S WEST corporate entities is itself a protected speech activity.

**3.** Given the clear First Amendment attributes of the above speech activities, statutes which might be interpreted either to impede U S WEST's use of CPNI or to interfere with the communication of CPNI within its corporate family should be narrowly construed. Specifically, Section 222 — which contains no affirmative approval requirement on its face — should not be construed to require U S WEST to obtain affirmative customer approval before it can access or use its CPNI or share that CPNI with any of its affiliates (including a Section 272 affiliate).

**4.** Nor should U S WEST be put in the position where it must choose between exercising its free speech rights and respecting a customer's expectations of privacy.

That would be an unlawful conditioning of U S WEST's constitutional rights. Thus, any requirement that a BOC must share CPNI equally as between an affiliated company and an unaffiliated telecommunications provider, or that a BOC must use the same process of customer approval for both entities, would be constitutionally suspect.

CPNI Is Information Forming The Foundation For Protected Speech

CPNI is information owned and collected by U S WEST in its capacity as a provider of service to millions of customers. As such, it is the foundation for informed speech between U S WEST and its customers or potential customers. The creation, compilation and communication of information lie at the core of what the First Amendment protects.

CPNI is an essential ingredient of expression — the raw material, as it were, for informed and protected speech. In this regard, CPNI is similar to other data inputs, such as wire service reports that serve as raw material for newspaper stories. This raw data is sometimes used unedited and is sometimes rewritten into stories which are then compiled into a newspaper and distributed to readers.

The connection between information and speech is inextricable. Indeed, the Supreme Court has applied the First Amendment even to regulations dealing merely with *physical* objects and substances essential — in a purely instrumental rather than intrinsic sense — to the formulation and communication of speech. For example, in Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 574, 581 (1983), the Court held that the imposition of a state use tax on the cost of paper and ink products consumed in production of newspapers violated the First Amendment. Again, in Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426-29 (1993), the Court struck down a ban prohibiting the use of newsracks to hold "commercial handbills" when no comparable ban applied to newsracks containing "newspapers."[2] It follows *a fortiori* that similar restrictions on intangible, information-bearing inputs, such as CPNI, that go beyond reasonable time, place and manner restrictions and that directly burden the constitutive elements of speech itself, would not be upheld.

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[2] See also Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988) (striking down statute giving mayor unbridled discretion over whether to permit newsracks to be affixed to public property on city streets).

Communication Of CPNI Between U S WEST Affiliates Is Itself Protected Speech

While the fact that CPNI forms the foundation for speech activities is quite obvious, less obvious might be the constitutionally significant fact that the communication of CPNI between and among U S WEST affiliates is itself protected speech. The fact that one U S WEST affiliate might have a relationship with a given customer, while another might not, does not eliminate the constitutional protection to which the communication of information between and among U S WEST's affiliates is entitled.

For example, in Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979), the Supreme Court rejected any attempt to impose a requirement that speech, in order to be afforded First Amendment protection, occur publicly, *i.e.*, from within an organization to those outside. As the Court succinctly stated,

> The First Amendment forbids abridgment of the "freedom of speech." Neither the First Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

Id. at 415-16. The clear teaching of Givhan is that speech such as that under consideration here, *i.e.*, speech between two affiliated entities, is not stripped of First Amendment protection simply because it does not amount to a public communication.

While in certain specialized contexts (such as the discipline or discharge of public employees, where the government acts in a proprietary as well as sovereign capacity) speech on matters of purely private concern may be subject to more extensive government regulation,[3] it is obvious that the communication of CPNI between different units of

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[3] See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 593 (1985) (holding that false statements in a company's credit report did not involve matters of public concern which would have required a showing of actual malice for recovery of presumed and punitive damages under the standard of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)); Connick v. Meyers, 461 U.S. 138 (1983) (holding that an assistant district attorney's discharge did not violate her free speech rights, where the attorney was discharged for circulating a questionnaire concerning internal office affairs, which the Court deemed to be speech on an issue of personal, not public, concern).

I believe that the holdings of both these cases are inapposite to the current analysis. The Dun & Bradstreet case should be limited to the defamation context, and even in that context does not

U S WEST is not purely a matter of private concern. CPNI is valuable commercial information that is central to developing, designing, and marketing new kinds of telecommunications and other services for U S WEST's customers and communicating with its customers about those offerings. It is precisely the kind of information that the Supreme Court has described as being the lifeblood of a free enterprise economy:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[4]

Based on the above, I believe that the communication of CPNI between and among U S WEST affiliates is itself protected speech. As such, any restriction on that speech should be confined to appropriate time, place and manner regulations. An outright ban on such communication, or the adoption of a "manner" restriction that would effectively operate as a ban (*e.g.*, the requirement of affirmative approval), would violate the First Amendment.

A Prior Approval Requirement To Access, Use Or Share CPNI Would Violate U S WEST's Free Speech Rights, As Well As Those Of Its Customers

Any rule requiring that U S WEST secure a customer's affirmative "opt-in" approval before it could make use of CPNI would raise serious First Amendment questions. Response

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stand for the proposition that speech involving matters of "private" concern is generally accorded diminished First Amendment protection. See Gertz, 418 U.S. at 346 (noting the impropriety of a standard that would force state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not). Similarly, Connick should be limited to the specialized context of public employers' decisions to discipline or discharge public employees. Again, the Connick Court took pains to make clear that its holding was not meant to cast doubt on the general principle that speech on "private matters" was not outside the First Amendment's protections. 461 U.S. at 147.

[4] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Indeed, the Commission itself has cited to this language in recognition of the societal and economic value associated with such speech. See Memorandum Opinion and Order, CC Docket No. 78-100, 77 FCC 2d 1023, 1035-36 para. 32 (1980).

rates for opt-in requests are notoriously low, and an opt-in rule would be, in effect, a prohibition on the use and transmission of CPNI.[5] Such a restrictive approach is all the more dubious because there are other obvious ways of securing customer approvals that do not intrude on speech, *e.g.*, through a notice and "opt-out" scheme reflecting the customer's expectations given his or her existing relationship with U S WEST.

In a variety of contexts, the Supreme Court has recognized that imposing an "opt-in" requirement to speak or gain access to information can be an unconstitutional burden on speech. For example, in Martin v. Struthers, 319 U.S. 141 (1943), the Court invalidated a city ordinance that forbade door-to-door solicitation unless the residents of the household had affirmatively requested the solicitor to approach. The Court explained that:

> For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the

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[5] In prior contexts, the Commission has acknowledged the problem any business — including one with an existing relationship with a customer — would have in securing an affirmative written document, particularly from a residential customer. Moreover, in the context of existing business relationships the Commission has held such authorizations unnecessary to protect consumer privacy. These findings have been repeatedly made over more than a decade, and in varying factual contexts, strongly suggesting that the findings are universal and not context-specific. See, e.g., BNA Second Recon. Order, 8 FCC Rcd. 8798, 8810 (1993); the Commission's Briefs in People of the State of California, et al. v. FCC, Nos. 92-70083, *et al.*, (9th Cir.), filed July 14, 1993; AT&T/MCI Order, 7 FCC Rcd. 1038, 1045 para. 44 (1992) (carriers have had little success getting customers to return written authorizations); Computer III Remand Order, 6 FCC Rcd. 7571, 7610 n.155 (1991) (under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction); Phase II Recon. Order, 3 FCC Rcd. 1150, 1163 para. 98 (1988) (customers would not object to use of CPNI to increase offerings made available to them); Phase II Order, 2 FCC Rcd. 3072, 3094 para 153 (such authorizations unnecessary to protect consumer privacy), 3116 n. 300 (1987); Bureau Waiver Order, 101 FCC 2d 935, 942 para. 21 (1985) (noting that even customers who make a verbal commitment to a company to engage in business might not return a signed authorization); 1985 FCC Waiver Order, 102 FCC 2d 503, 506 para. 6 (1985). Nothing about the adoption of Section 222 changes these prior observations, which essentially amount to "regulatory notice" of generally understood facts.

community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants.[6]

The Martin Court premised its decision on the right of the audience to receive information, as well as the speaker's right to convey it.[7] Compare Lamont v. Postmaster General, 381 U.S. 301 (1965) (where the Court invalidated a requirement that recipients of literature first notify the Post Office that they wished to receive it); and Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2391 (1996) (where the Court noted the "obvious restrictive effects" of a statutory regime which resulted in individuals being deprived of the ability to access information "without considerable advance planning . . . [Such] restrictions [would] prevent programmers from broadcasting to viewers who select programs day by day (or, through 'surfing,' minute by minute); to viewers who would like occasionally to watch a few, but not many, of the programs . . . ; and to viewers who simply tend to judge a program's value through channel reputation, *i.e.*, by the company it keeps").[8]

As in the Denver Telecom case, customers of U S WEST might well want to decide what information they want to receive offering by offering, or month by month, or circumstance by circumstance.[9] A prior affirmative approval requirement would deprive both U S WEST

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[6] 319 U.S. at 141.

[7] See id. at 143 ("this freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.").

[8] Certain of the Supreme Court holdings in the area of opt-in requirements arise in the context of information that might be deemed unpopular or embarrassing. See, e.g., the Martin decision (distribution of information by "poorly financed causes of little people," 319 U.S. at 146); Lamont (access to Communist literature); McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1516-17 (1995) (anonymous campaign materials). Compare Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986). The holdings of Martin and Denver Telecom, however, cannot be so limited, since the unpopular or embarrassing nature of the information was offered up only as a secondary or tertiary ground in support of the decisions.

[9] Indeed, my understanding is that the Commission has evidence before it, in the nature of a customer survey, that demonstrates that a substantial volume of customers want to receive information from their telecommunications provider about new products and services, and that this interest is particularly pronounced in certain identifiable customer segments. See Pacific Telesis Survey, Questions 9-11 and Analysis at page 9.

and its customers of the ability to engage in such speech activities, in the absence of the customer's considerable advance planning in ensuring that a previous communication had been made to U S WEST pre-approving the future dialogue.[10]

The teaching of the above cases is that any affirmative approval requirement to access or to use information in one's possession, or to fashion communications from that information, would be presumptively unconstitutional. In the context of Section 222, I do not believe such a requirement could be upheld.

Because it is undisputed that an affirmative written approval requirement would result in a telecommunications carrier's being cut off from all but a small portion of the CPNI in its possession, it is clear that such a requirement would severely restrict access to the raw data for speech and the communication of speech itself. That would violate the First Amendment rights not only of U S WEST but of its customers as well. Certainly, nothing in the recently enacted Section 222 specifically imposes such a constitutionally infirm customer-approval process.

It is clear that Section 222 seeks to protect certain customer privacy interests in the information possessed by telecommunications carriers generally. But it is equally clear that that Section does not mandate affirmative written approvals from customers before telecommunications carriers with existing business relationships, or their affiliates, access,

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[10] I am aware of Section 222's provisions for oral approval on inbound calls, see Section 222(d)(3), as well as the fact that, theoretically, an oral outbound telemarketing campaign for approval is not beyond the statute's permissible "approval" methodologies. However, where U S WEST's main telecommunications operations have between 10 and 11 million customers, such an approval methodology is certain to suppress speech for some significant period because the process of securing approvals itself would be extremely labor-intensive and quite expensive, undoubtedly causing U S WEST to refrain from speaking in situations where it might otherwise be inclined to speak. Compare Denver Telecom, 116 S. Ct. at 2391 (rejecting an "opt-in" approach to information access in part due to the added costs and burdens that these requirements impose upon a cable system operator, which might encourage an operator to ban programming that the operator would otherwise permit to run). I believe a similar situation would arise were U S WEST required to secure affirmative oral approvals from its existing customer base.

use or share CPNI. Indeed, such a requirement, with respect to any business and its speech activities with its customers, would be unprecedented.[11]

It is equally clear, however, that customer privacy protection can be assured by utilizing much less speech-suppressing mechanisms than affirmative approvals. The Commission's obligation to construe federal statutes in a manner that attempts to sustain their constitutionality strongly argues for a statutory interpretation that looks to some privacy-protection method other than affirmative approvals. See Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988).

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[11] Compare 47 U.S.C. Section 551(b)(1) (requiring written or electronic consent (i.e., affirmative approval) only to share subscriber information with unaffiliated third parties). Indeed, I have been advised that the only affirmative written consent requirement involving a business' own use of its information is found in the Commission's current CPNI rules, stemming from its Open Network Architecture (ONA) environment. There, the Commission has required that BOCs (and GTE) secure affirmative written consent from customers with more than 20 lines before those companies are permitted to use CPNI in the marketing and selling of enhanced services and customer premises equipment (CPE). A failure to secure such affirmative approval renders the information "restricted," such that it can be used only for network services marketing and sales.

Nothing about the history of the Commission's current CPNI rules calls into question the constitutional arguments developed here. Even if estoppel-like arguments were applicable — despite such cases as New York v. United States, 505 U.S. 144, 183 (1992), and despite the fact that in the First Amendment realm the rights of listeners as well as those of speakers are at stake — it is my understanding that the BOCs did not contest the constitutionality of the current CPNI rule largely because they did not perceive the rule as operating as a fundamental (almost *per se*) barrier to their speech with customers with more than 20 lines. As the Commission itself acknowledged, carriers often have a special relationship with larger customers and can fairly easily secure approval to use the information or obtain it outside the customer record itself. See Computer III Remand Order, 6 FCC Rcd. at 7611 para. 86; Communications Satellite Corporation Petition for Declaratory Ruling, 8 FCC Rcd. 1531, 1535 n.39 (1993). Thus, the Commission's rule was not anticipated to (nor did it) suppress speech to any significant extent.

Moreover, the Commission's rules pertained to the use of CPNI only with respect to two related markets, i.e., enhanced services and CPE. This "affirmative consent" regime should be compared to that currently being proposed by the Commission, where an affirmative approval requirement is being suggested across a telecommunications carriers' entire base of customers and with respect to any services not stemming from the service from which the CPNI was derived. The contexts are totally different.

There are certainly other models for protecting customer privacy, while still accommodating customer expectations. For example, the Martin case, as well as others,[12] demonstrate that the First Amendment permits government to empower individuals with the means to ensure that they are left alone. Indeed, the Commission's own cases and rules establish a "do not disturb" policy with respect to telemarketing, whereby an individual can request not to be contacted even by a business with which he or she has an existing business relationship.[13] Such "opt out" processes permit communication to flow freely and spontaneously, restricting speech only in those circumstances where an individual makes clear his/her desire not to engage in it.

Thus, I conclude that a customer's privacy interests would be fully addressed by the kind of "opt-out" procedure that I understand U S WEST and other telecommunications carriers are proposing. Any customer who wishes to prevent CPNI relating to him or her from being used by U S WEST's telecommunications carriers, or from being shared with other U S WEST affiliates, would have the opportunity to accomplish precisely that result through a notice and opt-out procedure. See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1510 (1996) (noting availability of alternatives that would not intrude on speech in holding restriction unconstitutional); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593-94 (1995) (same); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech).

The Commission Should Not Condition U S WEST's Exercise Of Its Constitutional Rights

I understand that arguments are being made, in portions of the above-referenced proceedings, that a BOC Section 272 affiliate and all third parties must be treated "equally" with respect to access and use of CPNI. In part, this obligation is said to derive from the language of Section 272(c)(1), and from the Commission's prior determination that CPNI is included in the word "information" used in that Section, thereby creating an obligation to provide CPNI on a non-discriminatory basis as between the BOC affiliate and non-affiliates.

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[12] See also Rowan v. Post Office Dept., 397 U.S. 728 (1970) (government may confer on an addressee the power to compel a mailer to remove his or her name from a mailing list); Frisby v. Schultz, 487 U.S. 474, 493 (1988) (Brennan, J., dissenting) ("unwanted mail may be forbidden").

[13] TCPA Order, 7 FCC Rcd. 8752 (1992); 47 CFR Section 64.1200(e)(2).

While there might be a non-discrimination obligation contained in Section 272(c)(1) with respect to providing CPNI to those duly authorized to receive it, any such obligation does not warrant treating U S WEST's affiliates the same way as non-affiliates with respect to the approval processes associated with access to CPNI. Indeed, treating both entities the same way would amount to an unconstitutional conditioning of U S WEST's First Amendment rights.

In particular, I focus here on proposals providing that whatever customer approval methods a BOC uses with respect to CPNI access, use and sharing within the BOC and among its affiliates would be deemed an appropriate customer authorization method to use in forcing the disclosure of CPNI outside the BOC and its affiliated companies. Under such proposals, if a BOC used an opt-out procedure to secure prior affirmative approvals from its customers, then such an opt-out procedure would automatically be deemed appropriate to force disclosure of the CPNI to unrelated telecommunications providers as well.

These proposals raise constitutional difficulties because they ignore the vital distinction between a BOC's own affiliates and unrelated third parties. As the Commission itself has recognized, and as seems self-evident, a customer's privacy expectations vary by relationship. There are minimal (if any) privacy concerns within an existing business relationship.[14] And the lack of privacy concerns extends to affiliated companies.[15] In contrast, in the absence of an ongoing business relationship with the customer, there arise special privacy concerns which must be accommodated.[16]

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[14] TCPA NPRM, 7 FCC Rcd. 2736, 2738 paras. 13-14 (1992); TCPA Order, 7 FCC Rcd. at 8770 para. 34. And see the Commission's Computer III Remand Order, 6 FCC Rcd. at 7610 para. 86 (where it noted that internal BOC access to CPNI did not raise significant privacy concerns); Phase II Recon. Order, 3 FCC Rcd. at 1163 para. 98 (where it noted that most RBOC customers would not object to having CPNI shared internally to increase offerings to customers).

[15] TCPA Order, id.; Bank America Order, 8 FCC Rcd. 8782, 8787 para. 27 (1993) (holding that information sharing between affiliates was not improper). See also U S WEST Comments, n.18, filed June 11, 1996 (citing to 1994 Louis Harris & Associates and Dr. Alan F. Westin survey done for MasterCard International, Inc. and VISA, USA, Inc. The survey demonstrated that a majority of those surveyed approved sharing information with affiliates to bring new or additional services, with the percentages increasing as the specific type of sharing and service offered was made explicit).

[16] The Commission has recognized that disclosure of CPNI to third parties, when not associated with a customer request to release the information, raises privacy concerns. Computer

Thus, it is reasonable to conclude that customers ordinarily desire (or, at a minimum, do not object to) communications from businesses with which they already have a relationship and from their affiliates. Accordingly, an opt-out arrangement fully protects customers' interests in these circumstances. But customers do not ordinarily expect a company to share confidential information with unrelated third parties. In that context, inferring customer approval on the basis of an opt-out procedure for an unrelated party would violate customer privacy expectations, whose protection is the ostensible purpose of 47 U.S.C. Section 222.

Therefore, forcing a BOC to use the same method for obtaining customer approval for affiliates and third parties would cause serious problems. In practical terms, a BOC's choice would be between (i) using an opt-out procedure for both itself and unrelated entities, thereby violating the trust of established customers (and concomitantly forfeiting their goodwill),[17] and (ii) using an opt-in procedure throughout that would effectively silence the BOC because of the difficulty of obtaining affirmative approvals. Imposing such a Hobson's choice would be constitutionally questionable under the doctrine of unconstitutional conditions.

In order to engage in constitutionally protected speech, U S WEST would be forced to compromise or violate its customers' privacy expectations, in contravention of the intentions of Section 222 itself, if it desired to make use of its own commercial information to communicate either internally or externally. Since, as survey evidence before the Commission demonstrates, local telecommunications carriers hold a place of high trust in the minds of their customers, and are not thought to release information inappropriately,[18] it would be unconscionable to force such carriers to release CPNI to third parties based on a notice and opt-out model solely to ensure their own continued access to the CPNI. I am

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III Remand Proceedings, 6 FCC Rcd. at 7611 para. 86. Compare 47 U.S.C. Section 631(b)(1) (holding that subscriber information cannot be released to third parties except with the written or electronic consent of the subscriber).

[17] A notice and opt-out model might be appropriate for the release to third parties of name and address information only. See 47 U.S.C. Section 551(c)(2)(C)(i) (cable act); 18 U.S.C. Section 2710(b)(2)(D)(i) (video privacy act). Compare BNA Second Report and Order, 8 FCC Rcd. 4478, 4486 para. 39 (1993) and 47 C.F.R. 64.1201(e) (allowing for release of name and address information). But it has generally not been considered appropriate for the transfer of other, more substantive, information. See 47 U.S.C. Section 551(b)(1) (requiring written or electronic consent to release subscriber information).

[18] Pacific Telesis Survey, Questions 2C, 3.

advised that, in practical effect, an "equality" principle applied to a notice and opt-out approval methodology would most likely result in information not being accessed or used internally in forming the foundation for constitutionally protected speech.[19]

In effect, the government would impose a penalty on BOCs — the disruption of their relationships with existing customers — if the BOCs were to choose an opt-out CPNI procedure to permit themselves to speak. Such a forced choice raises serious questions, to say the least, under the unconstitutional conditions doctrine, which recognizes that "'constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights.'" Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2347 (1996) (internal citation omitted); see also O'Hare Truck Service, Inc. v. City of Northlake, 116 S. Ct. 2353, 2357 (1996).[20]

In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), for example, the Supreme Court held that a state agency could not condition the approval of a rebuilding permit for beachfront property on the owners' agreement to waive their property right to deny free public access to the beach. The Court explained that, even though the state agency could

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[19] For example, the Commission's cellular CPNI rule (47 C.F.R. Section 22.903) contains a "share equally" requirement, the result of which (I have been advised) is that carriers have chosen not to share the CPNI at all. Not only does such a regulatory mandate seem strange, given the fact that competitors of RBOCs have no absolute legal claim to CPNI (see, e.g., Catlin v. Washington Energy Company, 791 F.2d 1343 (9th Cir. 1986)), but it appears contrary to both commercial and public interests. See SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1494-95 (1995). Indeed, in the SBC case, the Commission itself argued that "courts have consistently recognized that capitalizing on informational efficiencies . . . is not the sort of conduct that harms competition," and that it "is manifestly pro-competitive and beneficial to consumers to allow a multi-product firm . . . maximum freedom in offering its competitive services to all of its customers" by utilizing CPNI. FCC Final Brief in SBC v. FCC at 49-50. There is nothing about the passage of Section 222 or its language that suggests a contrary position.

[20] Under this doctrine, public broadcasting stations, for example, cannot be required to choose between accepting public funds and engaging in editorial speech. See FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984). Public employees cannot be put to the "choice" of joining the prevailing political party or leaving their jobs. See Rutan v. Republican Party of Illinois, 497 U.S. 62, 69, 72 (1990). Recipients of unemployment compensation cannot be told to change their religious views or forgo public assistance. See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139-43 (1987).

have denied the permit outright, linking it to a waiver of the right to exclude amounted to an inappropriate "leveraging of the police power." Id. at 837 n.5. See also Dolan v. Tigard, 512 U.S. 574 (1994) (reaffirming Nollan and invalidating a rule that a property owner could not expand her store and pave her parking lot unless she dedicated a portion of her property for a public greenway and a pedestrian/bicycle pathway).

In Nollan, the Court held that the refusal to issue the needed permit was an unconstitutional condition on the owners' property rights — "not a valid regulation of land use but 'an out-and-out plan of extortion.'" 483 U.S. at 837. In the CPNI context, forcing BOCs to use the same methods for securing customer authorizations for both their affiliates and their competitors has a similar extortionate effect: if the BOC wishes to use a notice and opt-out procedure (the only effective method for enabling the BOC itself to speak), it must violate its customers' trust by affording its competitors access to the CPNI unless customers opt out. Such a choice is impermissible under the unconstitutional conditions doctrine.

Conclusion

For all these reasons, I conclude that an affirmative approval requirement for a telecommunications carrier to access or use CPNI internally or to share it with its affiliates would raise serious questions under the First Amendment. Thus, in keeping with the Commission's obligation to construe legislative enactments in a manner that avoids rather than raises constitutional difficulties, the Commission should not impose such a requirement.

U S WEST, and I, appreciate your consideration of this opinion. We would be happy to pursue the matters addressed herein at your convenience. Should you wish such a discussion, please advise Kathryn Marie Krause, Esq., U S WEST's counsel, at (303) 672-2859. She will be responsible for making the appropriate arrangements.

Sincerely,

Laurence H. Tribe

Laurence H. Tribe

TAB H

9-10-97

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CC 96-115
WT 96-162

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EX PARTE OR LATE FILED

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RECEIVED

SEP 10 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 10, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222, SC-1170
1919 M Street, N.W.
Washington, DC 20554

RE: Ex Parte -- Customer Approval For Internal Access, Use and Disclosure of Customer Proprietary Network Information ("CPNI"), CC Docket No. 96-115; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149; and Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162.

Dear Mr. Caton:

Pursuant to Commission rule 47 C.F.R. § 1.1206(b)(1) attached are an original and six copies of a written ex parte presentation which was submitted to Mr. A. Richard Metzger, Ms. Dorothy T. Attwood and Mr. John Nakahata on September 10, 1997. Please associate this presentation with the above-referenced proceedings.

Acknowledgment of this submission is requested. A copy of this letter and the ex parte presentation is provided for this purpose. Please date stamp this copy and return it to the messenger who has been instructed to wait for it.

Please call if you have any questions.

Sincerely,

No. of Copies rec'd 0+6
List ABCDE

Attachment

Kathryn Marie Krause
(RW)

OCT - 8 1997

LAURENCE H. TRIBE
1575 MASSACHUSETTS AVENUE
CAMBRIDGE, MASSACHUSETTS 02138

September 10, 1997

**EX PARTE**

Mr. A. Richard Metzger, Deputy Bureau Chief, Common Carrier Bureau
Ms. Dorothy T. Attwood, Senior Attorney, Common Carrier Bureau
Policy and Planning Division
Mr. John Nakahata, Chief, Competition Division, Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 500 (Metzger)
Room 533 (Attwood)
Room 658 (Nakahata)
Washington, D.C. 20554

RE: Ex Parte Filing in CC Docket Nos. 96-115; 96-149; 96-162

Dear Messrs. Metzger, Nakahata and Ms. Attwood,

In a letter dated June 2, 1997, I wrote to you on behalf of U S WEST, Inc. with respect to certain proposals before the Commission regarding the use and disclosure of customer proprietary network information (CPNI).

Although it was not sent directly to me, I have been made aware of an ex parte letter filed with the Commission on July 7, 1997 by Mr. Bruce Ennis on behalf of MCI Telecommunications Corporation, which purports to take issue with my analysis. However, significant portions of Mr. Ennis' letter are premised on misapprehensions of my prior communication to you.

In my prior letter, I explained that:

- Given the clear First Amendment attributes of CPNI-related speech, the 1996 Telecommunications Act — whose provisions (including Section 222) contain no affirmative consent requirement on their face — should not be construed to require a BOC to obtain affirmative customer consents before it can use its CPNI or share that CPNI with any of its

affiliates (including a Section 272 affiliate). Instead, the Act should be interpreted as permitting an "opt-out" approval mechanism whereby, so long as customers did not object, a BOC would be permitted to access and use CPNI internally and to share CPNI with its affiliates.

• Nor should the Act be interpreted as requiring BOCs to share CPNI equally as between an affiliated company and an unaffiliated telecommunications provider, or to use the same process for customer approval for both entities. In practical terms, such a rule would force a BOC to choose between (i) using an opt-out procedure for both itself and unrelated entities, thereby violating the trust of established customers (who would not expect CPNI to be shared with unrelated entities absent affirmative consent by customers), and (ii) using an opt-in procedure throughout that would effectively silence the BOC because of the difficulty of obtaining affirmative consents.

Mr. Ennis proceeds from the view that I advocate a construction of Section 222 that would "allow BOCs to use or share CPNI with their long-distance affiliates without prior customer approval," Ennis Letter at 2 — even though Section 222 specifically requires customer "approval" except in certain circumstances. That description of my position is not correct, on a number of levels.

As I made clear in my initial letter, I assuredly *do not advise* the Commission to forgo the requirement of customer approval. Rather, the question is how approval is to be measured. Nothing in the statute requires an opt-in procedure rather than an opt-out arrangement, and Mr. Ennis cites no legislative history or canon of statutory construction on the matter. My point is that — given the absence of an unambiguous congressional statement compelling such a burden on First Amendment activities — the 1996 Telecommunications Act *should not* be construed as requiring express affirmative consent by customers in order to allow BOCs to use CPNI or share it with their affiliates. Mr. Ennis admits that "it is unlikely that most consumers would go through the process of making a written decision regarding the use of their CPNI" (Page 7). Accordingly, a requirement of express affirmative consent would in effect silence the BOCs. It is well-settled that statutes are to be construed where possible to avoid constitutional questions, and the Commission should heed that maxim in construing Section 222. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Moreover, Mr. Ennis is wrong to focus on Section 222 as a statutory provision imposing special CPNI obligations specific to BOCs. Section 222 applies to all

telecommunications carriers. The Commission has proposed deriving special CPNI rules for BOCs based on the nondiscrimination provisions of Sections 272 and 274 — provisions that say nothing about customer consent (or about CPNI in particular). There is every reason to read the nondiscrimination provisions narrowly to avoid the constitutional question that would otherwise be presented.

Mr. Ennis contends that the communication and use of CPNI are not protected by the First Amendment because they are "business activities." That is a non sequitur. Operating a cable system or publishing a newspaper are "business activities" as well, but they are certainly entitled to First Amendment protection. The CPNI owned by U S WEST is a vital data input which provides the foundation for informed communication between U S WEST personnel and its customers. It is much more integral to protected expression than were the purely physical inputs whose regulation was held to violate the First Amendment in Minneapolis Star v. Minnesota Comm'r of Revenue, 460 U.S. 574, 581 (1983) (paper and ink products), or Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426-29 (1993) (newsracks).

Further, the sharing of CPNI between or among U S WEST corporate entities is itself a protected speech activity. It represents the communication of information — which of course is just what the First Amendment protects. If anything, CPNI is far more informative than many of the forms of expression that are protected under the First Amendment. E.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991) (plurality opinion) (nude dancing); Ward v. Rock Against Racism, Inc., 491 U.S. 781, 790 (1989) (music); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (assuming that sleeping in park is protected expression); Spence v. Washington, 418 U.S. 405, 409 (1974) (per curiam) (hanging American flag upside down with peace symbol taped to it); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969) (wearing black arm bands to school). For example, a federal district court recently ruled that computer software programs are a form of protected expression "like music and mathematical equations." Bernstein v. United States Dept. of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996).[1]

That the expression occurs within the U S WEST corporate family does not eliminate the constitutional protection to which the communication is otherwise entitled, under

[1] On August 25, 1997, the court reaffirmed its prior ruling, holding that the Clinton Administration's revised restrictions on encryption software exports are an unconstitutional prior restraint in violation of the First Amendment. Bernstein v. United States Dept. of State, No. C-95-0582 MHP (N.D. Cal. Aug. 25, 1997).

decisions like Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 415-16 (1979).[2] Indeed, any other rule would be unthinkable: it would permit the government to prohibit communications between a company's executives or between a parent corporation and its subsidiary.[3]

Mr. Ennis does not deny any of this; in fact, he admits (at page 4 of his letter) that "[t]he sharing of proprietary information internally or with an affiliate does not . . . amount to 'propos[ing] a commercial transaction.'" That is just the point. The sharing of CPNI between or among U S WEST corporate entities is entitled to full, undiluted First Amendment protection — not simply to the intermediate scrutiny applicable to restrictions on commercial speech.

The bulk of Mr. Ennis' argument is that an affirmative customer consent requirement can be justified by an interest in consumer privacy and what Mr. Ennis calls an interest in "competition." (Page 7 of his letter). Much of his analysis is beside the point or in fact supports my view. Of course I do not deny that Section 222 reflects a concern for consumer privacy. My point is that this concern can be fully accommodated by an opt-out arrangement which permits consumers to take steps to prevent BOCs from sharing CPNI with their affiliates. Such an opt-out procedure is hardly meaningless — it is used, for example, to measure consent in class actions under Fed. R. Civ. P. 23 — and in fact it reflects the expectations of consumers that CPNI relating to them would, absent objection, in fact be shared among members of a corporate family.

Mr. Ennis further asserts — with no supporting citation — that "Congress has determined that the unrestricted use or dissemination of CPNI to market other services would harm competition." (Page 7). Congress has made no such determination, and in fact unrestricted use of CPNI is typically understood to be pro-competitive. See People of State

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[2] Mr. Ennis attempts to relegate Givhan to the context of the government's power to regulate speech in its capacity as employer (page 4 n.4 of his letter). The attempt backfires. It is settled that, when government acts in a proprietary capacity as employer, it has even greater authority to discipline or discharge employees based on their speech. The principle manifested in Givhan applies a fortiori here.

[3] Mr. Ennis' reference to forms of speech that are themselves instruments of crimes or wrongful conduct — such as speech constituting an agreement to fix prices in violation of the antitrust laws (page 3 of his letter) — is utterly beside the point. The substance of the communication at issue here is not itself illegal, and no one suggests otherwise.

of California v. FCC, 39 F.3d 919, 931 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995) ("The FCC found that the BOCs are uniquely positioned to reach small customers, and that it would be economically infeasible to develop a mass market for enhanced services if prior authorization was required for access to CPNI. If small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option and thereby impair the development of the mass market for enhanced services in the small customer market."); SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1495 (D.C. Cir. 1995) (upholding FCC judgment that it was in the public interest to allow AT&T/McCaw's use of CPNI to enhance its ability to market its service directly to the customers of other cellular carriers, because such use "should lead to lower prices and improved service offerings designed to lure those customers away").

Indeed, unrestricted use of individually identifiable customer information is the norm in contexts as diverse as cable service, credit cards, mail order catalogs, and grocery purchases. Competitors have no legally enforceable right to receive such information. See, e.g., Catlin v. Washington Energy Co., 791 F.2d 1343 (9th Cir. 1986) (utility was not guilty of monopolization under § 2 of the Sherman Act for passing along customer information to its merchandising division while withholding it from its competitors).

In fact, Mr. Ennis' proposal would disserve competitive equity: long-distance providers have substantial CPNI in their possession, yet under Mr. Ennis' view they would have no reciprocal obligation to provide customer information to BOCs absent affirmative customer request. In addition, his solution — that BOCs be forced to divulge CPNI to competing long-distance providers if they wish to share the CPNI within the BOC corporate family — runs afoul of the obvious purpose of Section 222 in protecting consumer privacy interests. The undenied evidence (see pages 7 & n.9, 11 & n.15 of my letter of June 2, 1997) is that a majority of consumers approve of sharing information with affiliates to develop and market new and additional services. By contrast, consumers would not likely expect U S WEST to share CPNI with unrelated companies.

Mr. Ennis also contends that the burden on U S WEST of an affirmative customer consent requirement could be minimized by permitting "oral" approval to suffice. As I noted in my original letter, however (page 8 n.10), U S WEST has between 10 and 11 million customers. Any campaign to solicit oral approvals would be extremely labor-intensive and costly. U S WEST has informed me of the results of its affirmative consent CPNI trial, which confirm my views on this point.

Finally, Mr. Ennis takes issue with the point that BOCs would suffer an unconstitutional burden by being forced to choose between not sharing CPNI with their affiliates, or sharing it on equal terms with their competitors. He insists that "the unconstitutional conditions doctrine does not apply in this context at all." Letter, p. 9. But there is no CPNI exception to the Constitution. The reality — as the filings before the Commission demonstrate — is that competitors like MCI have a keen interest in obtaining the BOCs' CPNI and in preventing BOCs and their affiliates from using the CPNI. If BOCs are required to divulge this sensitive information to competitors as a condition of the BOCs' own speech — i.e., the BOCs' expression of the information to their affiliates and the BOCs' use of it to communicate with their customers — then the BOCs' speech will be penalized and discouraged. That is precisely the sort of Hobson's choice that triggers the unconstitutional conditions doctrine.

For all these reasons, it remains my view that an affirmative consent requirement as a precondition for a telecommunications carrier to use CPNI internally or to share it with its affiliates would raise serious questions under the First Amendment. In keeping with the Commission's obligation to construe legislative enactments in a manner that avoids rather than raises constitutional difficulties, the Commission therefore should not impose such a requirement.

Sincerely,

Laurence H. Tribe

Laurence H. Tribe

cc: Mr. Bruce Ennis